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THE

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AND

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MEMORANDA.

June 29. *The Great Seal was delivered to* THE RIGHT HONOURABLE HARDINGE STANLEY, LORD HALSBURY, *and he took the oath of office as Lord Chancellor of Great Britain.*

July 8. SIR RICHARD EVERARD WEBSTER, *G.C.M.G., Q.C., was appointed Attorney-General in the place of* SIR ROBERT THRESHIE REID, *Q.C.*

Aug. 30. ROBERT BANNATYNE FINLAY, *Esq., Q.C., was appointed Solicitor-General in the place of* SIR FRANK LOCKWOOD, *Q.C., and was afterwards knighted.*

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Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTCH)

AND

THE JUDICIAL COMMITTEE

OF

HER MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

[HOUSE OF LORDS.]

THOMAS WARNE LEMMON . . . . APPELLANT;

AND

WALTER WEBB . . . . . RESPONDENT.

H. L. (E.)
1894
Nov. 27.

Nuisance—Trees overhanging Neighbour's Land for more than Twenty Years—Right to abate Nuisance without Notice.

The owner of land which is overhung by trees growing on his neighbour's land is entitled, without notice, if he does not trespass on his neighbour's land, to cut the branches so far as they overhang, though they have done so for more than twenty years.

The decision of the Court of Appeal ([1894] 3 Ch. 1) affirmed.

APPEAL from an order of the Court of Appeal (1).

The appellant and respondent were adjoining landowners, the respondent having bought his land in 1879. On the appellant's land near the boundary were several large old trees, branches of which overhung the respondent's land, and had done so for much more than twenty years. The respondent without giving notice to the appellant and without trespassing on his land cut

(1) [1894] 3 Ch. 1.

H. L. (E.) 1894 LEMMON v. WEBB.

off a number of branches to the boundary line. The appellant brought an action against the respondent claiming: first, a declaration that the respondent was not entitled to cut any overhanging branches when the overhanging had continued many years and that he was only entitled to cut recent growth, and further or in the alternative that he was not entitled to enter upon the appellant's land for the purpose of cutting overhanging branches, either absolutely or at all events not until after due notice to the appellant; secondly, an injunction to restrain the respondent from cutting contrary to the above declaration; thirdly, damages for trespass and wrongful cutting.

Kekewich J. held that the respondent was not entitled to cut the branches without notice to the appellant and gave judgment for the appellant for £5 damages. The Court of Appeal (Lindley, Lopes and Kay L.JJ.) reversed that decision and dismissed the action (1).

Nov. 23, 27. *Warmington* Q.C. and *R. F. Norton* for the appellant:—

The question is whether the respondent had the right to cut the branches without notice to the appellant. It has been said that trees are not like a projecting bow-window and that no right could be gained as to trees. This may be so as to the roots which grow underground and cannot be watched, but branches grow in sight. It must be admitted that there is no direct authority for the proposition that a man may not abate a nuisance on his own land without notice, but it is in accordance with reason and common sense that an opportunity should be given to the tort-feasor to abate it himself. And though the dictum of Best J. in *Earl of Lonsdale* v. *Nelson* (2) is apparently against the appellant, it asserts the general principle that, except in the case of overhanging branches, the injured party may not abate a nuisance from omission without notice to the offending party; and no authority or reason whatever is given for the exception in the case of trees. There might be some reason for excepting a case of emergency, but this is not such a case. Even if there is a right to cut those parts of the branches which have grown

(1) [1894] 3 Ch. 1. (2) 2 B. & C. 302, at p. 311.

within twenty years there can be no right to cut the older parts, and the person who claims the right to cut must be very strict in not cutting beyond that point. Things which have been raised to cause a tortious nuisance may be immediately demolished whilst the misdeed is flagrant, not after a long interval: Bracton de Legibus Angliæ, bk. 4, fo. 233 (1). The respondent if he desired to assert his rights should have done so soon after he bought his land.

A quod permittat might be brought against a person in whose time a nuisance was levied, without any request made, but not against his feoffee without a previous request to reform the nuisance, nor (without such request) by a feoffee of the land to which the nuisance was done against the tort-feasor: *Penruddock's Case* (2); and (which is perhaps the same case) Jenkins' Centuries, 6th Cent. case 57, p. 260. The previous request is alleged in Herne's Pleader, 644, 646, tit. Quod Permittat: and see Assizes, Edw. 3, 260; Dig. xlvii. tit. 7, s. 6, sub-s. 2. Wherever a nuisance is one of omission, or is levied by a predecessor, notice is necessary: *Jones* v. *Williams* (3).

[They also cited the authorities referred to in the Courts below.]

Marten Q.C. and *J. Bradford*, for the respondent, were not heard.

LORD HERSCHELL L.C.:—

My Lords, the question raised by this appeal is whether, where branches of trees overhang the soil of another person, the person whose soil they overhang is entitled to remove those branches without notice to his neighbour on whose side of the boundary the trees grow. It is not disputed that if such notice

(1) "Ea vero quae sic levata sunt ad nocumentum iniuriosum . . . statim et recenter flagrante maleficio (sicut de aliis disseisinis) demoliri possunt et prosterni." As the parenthesis and the context shew, Bracton regarded nuisance as a species of disseisin, and his doctrine here is a branch of the ancient rule that a disseisee's right of entry must be exercised within four days, in addition to a reasonable time for him to come to the land: Bract. fo. 163.—F. P.

(2) 5 Rep. 100 b.

(3) 11 M. & W. 176, 181.

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be given, and if the neighbour do not remove the boughs, the person whose land they overhang would be entitled to do so, subject to the questions raised on the Prescription Act and the Statute of Limitations, which I will deal with in a moment. This of course involves an admission that against the will of the owner of the land the neighbour cannot insist that the boughs of his trees shall remain there, the only question being whether he is entitled to notice so that he may remove the boughs himself, or whether the person complaining of them may remove them. As regards the right, the difference does not seem to me to be one of extreme importance. In the present case, I think it is extremely probable that if notice had been given the plaintiff would not have removed the boughs, and that the defendant would have removed them after all. Nevertheless, if in point of law the person complaining of them can only remove them after notice, then the plaintiff in this action would be entitled to recover.

My Lords, it might be a reasonable provision of the law that such notice should be required, but whether it would be any great protection to the owners of trees near the boundary of their neighbour's land may be doubted. It might be very reasonable that there should be some law regulating the rights of neighbours in respect of trees, which, if planted near the boundary, necessarily tend to overhang the soil of a neighbour. It may be, and probably is, generally a very unneighbourly act to cut down the branches of overhanging trees unless they are really doing some substantial harm. The case is a very common one ; such trees constantly do overhang, and it certainly might call for the intervention of the Legislature if it became at all a common practice for neighbours to exercise what may be their legal rights in thus cutting off what would frequently be a considerable portion of the trees which grow on the other side of their boundary.

But, my Lords, the question is whether there is any authority for the proposition that notice must be given by the owner of the land before thus removing the encroaching boughs. In support of the proposition that notice is requisite, not a single authority has been cited. Now it is certain that the boughs of trees

have thus encroached, and that those whose land they have overhung have removed them, on many occasions. Actions in respect of such removal have occurred from time to time, the point at issue generally being whether the soil over which the branches were spread was the soil of the one person or the other; but I never heard it suggested in any of those cases (and certainly I can remember more than one within my own experience) that notice to the adjoining owner was requisite before the boughs could be removed.

Now, my Lords, what are the only authorities to which appeal has been made? They are cases where a nuisance has existed on neighbouring soil, where the person complaining of the nuisance could only get rid of it by going on to the soil of his neighbour; and there no doubt it has been held that he cannot justify going on to the soil of his neighbour to remove the nuisance except in a case of emergency, unless he has first given his neighbour notice to remove it. That is because his act involves an interference with his neighbour's soil—involves a trespass. But those cases of course are quite distinguishable from the present case where the act does not involve a trespass, but what is complained of is an encroachment on the soil of the man who removes the boughs, and what he does in getting rid of the encroachment is done on his own land, and therefore primâ facie needs no excuse so far as the place where he is doing the act is concerned. The present case, therefore, seems entirely distinguishable from those; and the question whether there are any cases in which such a notice may be necessary does not arise here. The question is whether such a notice is necessary prior to the removal of boughs overhanging a man's own land.

My Lords, the only dictum that can be found on the subject is a dictum of Best J. in the case of *Earl of Lonsdale* v. *Nelson* (1), a case which is not in point, inasmuch as there the Court had to determine whether the defendant could do acts upon his neighbour's land which involved considerable interference with his rights of property. Best J. says: "Nuisances by an act of commission are committed in defiance of those whom such nuisances injure, and the injured party may abate them without

(1) 2 B. & C. at p. 311.

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notice to the person who committed them, but there is no decided case which sanctions the abatement by an individual of nuisances from omission, except that of cutting the branches of trees which overhang a public road or the private property of the person who cuts them." There is, then, that dictum of Best J. on the point, but what seems to me more important is that there is not only no decision but no dictum whatever to be found to the contrary, and if we decided in favour of the plaintiff's claim we should not be interpreting the law, we should be making the law, and making it, not by the application of old principles to meet a new case, but by laying down conditions and limitations for the exercise of rights in a class of cases which has existed as long as the growth of trees and boundaries between neighbours have existed. It seems to me to be a case in which it is out of the question that we should lay down any proposition except that which, so far as we can find, has been regarded as the law in times gone by. I think, therefore, there is no warrant for saying that notice was requisite.

Then, my Lords, as regards the question whether the plaintiff has acquired any right by reason of the length of time these trees have overhung his neighbour's soil, I think it is impossible to say that he has either acquired a right to the land over which they hang or to their overhanging, under the Statute of Limitations. The trees, of course, grow from time to time, and their state each year is different from what it was the year before. The same remark applies to the suggestion that a prescriptive right has been obtained. The tree of to-day is not in the condition in which it was twenty years ago. It would be idle to suggest that the right gained at any time was the right to have the tree there in the condition in which it was twenty years before, and that it was only open to the adjoining owner to put back the tree into the condition in which it then was. The removal of what had grown in the meantime would, of course, be almost always, if not always, completely destructive of the tree. It seems to me impossible to say, in a case of this description, that a right is gained either by the Statute of Limitations or under the ordinary law of prescription. Those points indeed were very faintly urged (and one can quite understand why) by the

learned counsel for the appellant. They rested their appeal mainly on the allegation that the appellant was entitled to notice before the defendant did the acts complained of, and I think they have not established the proposition for which they contended.

Then, my Lords, it was said there had been some small trespass. The learned judge who tried the case said he did not think that was of importance; and it is obvious that this action was not brought on that account,—it was brought to try the question of right between the parties. Your Lordships would not enter on an inquiry of that description now. It would make no difference whatever as to the costs of the action, because that was not the substantial question to be tried, and it is not suggested for a moment that there were any damages that could be more than nominal. Under these circumstances, I move your Lordships that the judgment appealed from be affirmed, and the appeal dismissed with costs.

LORD MACNAGHTEN:—

My Lords, I am of the same opinion. I think it is clear that a man is not bound to permit a neighbour's tree to overhang the surface of his land, however long the space above may have been interfered with by the growth of the tree. Nor can it, I think, be doubted that if he can get rid of the interference or encroachment without committing a trespass or entering upon the land of his neighbour he may do so whenever he pleases, and that no notice or previous communication is required by law. That, I think, is the good sense of the matter; and there is certainly no authority or dictum to the contrary. Whether the same rule would necessarily apply to the case of trees so young that the owner might remove them intact if he chose to lift them, or to the case of shrubs capable of being transplanted, may perhaps be worthy of consideration. That, however, is not the case here. It is admitted that the trees here are of great age, and the only possible remedy was by cutting or lopping the offending branches.

I am, therefore, of opinion that Mr. Webb has not exceeded his legal right, and that the appeal must be dismissed.

H. L. (E.) 1894 LEMMON v. WEBB.

LORD DAVEY:—

My Lords, in this case the only question which is submitted to your Lordships, is whether the defendant (the respondent in the present appeal) was within his rights in taking upon himself to cut the branches of certain trees so far as they overhung the land of the appellant, or whether, before taking that step, he ought to have given notice to the appellant of what he proposed to do. Now, your Lordships are asked, in a question affecting real property, to lay down a proposition which, so far as I can see, has no authority in support of it; indeed the authorities, so far as they go, seem to me to be opposed to any such idea. It is true that where a person desires to abate a nuisance, which can only be abated by going on the land of the person from whom the nuisance proceeds, he must usually give notice of his intention to do so. That seems to me to be reasonable, because his act of going upon his neighbour's land is primâ facie a trespass, and I can understand that he should be bound to give notice of his intention to do that which would be primâ facie a trespass before doing it. But in the cases of which the present is an example, where a man proposes to abate a nuisance exclusively by doing acts upon his own land without going upon the land of his neighbour from whom the nuisance proceeds, the same reasoning does not seem to me to apply.

Now, my Lords, the appellant's counsel very fairly admit that they have no authority directly in point; but they base an argument upon *Earl of Lonsdale* v. *Nelson* (1). They say that Best J. there lays it down that cutting the trees which overhang your land is an exception from the general rule that nuisances of omission cannot be abated without notice to the person from whom they proceed. Well, my Lords, stopping there, if we are to adopt Best J.'s judgment as stating the law, it is really an authority against the appellant. But the learned counsel for the appellant went on to say that there is no authority except the dictum of Best J. (which is not binding as an authority upon your Lordships' House) for the exception. It was naturally asked what was the authority for the rule from which this is supposed to be an exception, and I confess that

(1) 2 B. & C. at p. 311.

notwithstanding the evident industry which the learned counsel for the appellant had bestowed upon the case they have not satisfied my mind that there is any authority for stating as a general proposition the rule from which Best J. is supposed to have treated the case of trees as an exception. Whether that general rule exists or not it is not necessary to say. But *Earl of Lonsdale* v. *Nelson* (1), so far as it goes, is an authority against the appellant, because, if the rule exists, then we have the authority of Lord Wynford for saying that the case of trees is an exception from it.

My Lords, the dictum of Croke J. (2) seems to me to be against the appellant. "Si les rames de vestre arber excresce en mon terre, jeo poio eux succider, mes jeo ne poio justefier le succider de eux devant ils excresce en mon terre pur timor del'excrescer;" that is to say, If the boughs of your tree encroach upon my land I may cut them. He says not a word about notice; therefore, so far as that goes, it is an authority against the appellant.

Then, my Lords, it appears to me that the case of *Pickering* v. *Rudd* (3) is also an authority against the appellant. In that case the defendant managed by an arrangement of poles and scaffolding and ropes to cut away so much of a Virginian creeper planted on the plaintiff's land as encroached upon his land. There was no allegation that notice had been given, and no point was made either way of notice having been given or not having been given. So far as that case goes it is an authority against the appellant, because it was held there by the Court that the defendant was justified in cutting away so much of the Virginian creeper as encroached upon his land; and although, no doubt, every point was taken in that case that could be taken, nothing was said about the necessity for any notice beforehand.

Penruddock's Case (4) does not seem to me to assist the appellant at all, because the point which was decided in that case was whether a writ of quod permittat prosternere would lie against the alienee of the person who had levied the nuisance, and the report says this: "It was moved in the King's Bench, If the feoffee might abate the nuisance as the feoffor himself,

(1) 2 B. & C. at p. 311.
(2) 1 Roll. 394.
(3) 1 Stark. 56; 4 Camp. 219.
(4) 5 Rep. 100 b.

H. L. (E.) 1894 LEMMON v. WEBB. Lord Davey.

and as well in the hands of the feoffee who did not the nuisance as in the hands of the tort-fesor himself; and if the feoffee of the house to which the nuisance was made might do it (if he could do it) before he had some special prejudice, as in the dropping of the water, or if he ought to stay till he had special prejudice. And Popham C.J. held that in both cases the feoffee might abate the nuisance, and that before any prejudice, for it is reasonable that he should prevent his prejudice, and not stay till it be done; which was granted by the whole Court." It is quite true that it was held that in that case the writ quod permittat prosternere would not lie against the feoffee of the person who levied the nuisance without notice to him; but from the facts of that case it is perfectly obvious that what had to be done in order to abate the nuisance, which would involve the removal of a portion of the defendant's house, could only be done by going on the land. Therefore I do not think that *Penruddock's Case* (1) affords any authority to the learned counsel for the appellant for the proposition which they have submitted to your Lordships' House.

My Lords, I think it sufficient therefore to say that no authority has been cited to this House for the appellant's proposition, and the authorities, so far as they go, are rather against it than in favour of it; and when we come to look at the reason of the thing I entirely agree with what has fallen from my noble and learned friend on the woolsack that there is no such obvious consideration of justice as would induce this House to lay down for the first time the proposition contended for by the appellant.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals 27th November 1894.

Solicitors for appellant: *Broughton, Nocton, & Broughton.*
Solicitors for respondent: *Walter Webb & Co.*

(1) 5 Rep. 100 b.

[HOUSE OF LORDS.]

ELIZABETH THORNE . . . . . APPELLANT;

AND

STEPHEN CANN . . . . . RESPONDENT.

H. L. (E.)
1894
Nov. 19.

Mortgage—Purchase of Equity of Redemption—Transfer of Mortgage to Owner of Equity of Redemption—Intention to keep Security alive.

Where the owner of an equity of redemption pays off a mortgagee and takes an assignment of the mortgage, and the documents or circumstances shew an intention to keep alive the security, it is not extinguished but enures for the benefit of the owner of the equity of redemption.

Adams v. *Angell* (5 Ch. D. 634) approved.

Toulmin v. *Steere* (3 Mer. 210) distinguished and reflected on.

APPEAL from a decision of the Court of Appeal (1).

Piller, owner of freehold hereditaments in Devon, by deed of the 3rd of May 1880 mortgaged them to Rendell to secure £300. By deed of the 28th of September 1880 Piller mortgaged the same property to Forward to secure £150. By deed of the 29th of September 1882, to which Piller was a party, Rendell's mortgage was transferred to Miss Arnold, and in consideration of a further sum of £700 advanced by her the property was charged as security to her for the two sums of £300 and £700, making £1000. By deed of the same date Piller mortgaged the property to Henry Thorne, the appellant's testator, to secure £600.

On the 26th of August 1885 Piller was adjudicated bankrupt. By writing of the 23rd of February 1886 Searle agreed with Piller's trustee in bankruptcy to purchase the equity of redemption of the property and to release the trustee and the bankrupt's estate from all claims which he (Searle) had against the estate.

By deed of the 18th of May 1888 Miss Arnold assigned her mortgage for £1000 to Searle, a solicitor, under the circumstances stated in the judgment of Lord Herschell L.C. By deed of the 22nd of June 1888 Searle assigned that mortgage to the respondent.

In the above transactions Searle acted as solicitor for Piller,

(1) Not reported.

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Rendell, Forward, Miss Arnold and the respondent respectively, and gave to Forward, Miss Arnold and the respondent respectively undertakings that he would take a transfer of their securities after notice requiring him to do so, or at his option make good any deficiency which might arise on the realization thereof.

On the 2nd of June 1892 the respondent, under the power of sale in his mortgage, sold the property by auction to the appellant's testator, and afterwards brought an action against him for specific performance. The defendant objected to the title on the ground that there was no power of sale, contending that Miss Arnold's mortgage was extinguished when it purported to be transferred to Searle, and he counter-claimed for a declaration that his mortgage had priority over any charge of the respondent's, and for an order rescinding the contract of sale. Romer J., holding that there was an expressed intention to keep alive the mortgage transferred by Miss Arnold to Searle, decreed specific performance and dismissed the counter-claim, and this decision was affirmed by the Court of Appeal (Lindley, Kay and A. L. Smith L.JJ.).

During the action the defendant died and the proceedings were continued against the appellant, his executrix.

1894. Nov. 16, 19. *Cozens-Hardy* Q.C. and *W. F. Philpotts* for the appellant:—

The purchaser of an equity of redemption cannot set up a mortgage which he has got in against a subsequent incumbrance of which he had notice: *Toulmin* v. *Steere* (1), a case often observed upon, but never overruled and still law. Searle's intention to set up the mortgage makes no difference, for the only exception to the rule in *Toulmin* v. *Steere* (1) is where on the purchase of the equity of redemption there is an agreement with the mortgagor that the purchaser may keep mortgages on foot, or if no agreement there is evidence that this was the intention: see judgment in *Adams* v. *Angell* (2). Searle made no such stipulation in his purchase, and there was no evidence of intention. But the appellant need not rely on *Toulmin* v. *Steere* (1). The respondent derives his title from Searle, who was in the

(1) 3 Mer. 210. (2) 5 Ch. D. 634.

position of mortgagor, and the respondent cannot be in a better position than his vendor or transferor. The language of Knight Bruce L.J. in *Watts* v. *Symes* (1) applies: "A person who borrows money cannot be his own creditor, or set up an incumbrance of his own against his creditor." In *Otter* v. *Lord Vaux* (2) a mortgagor buying the estate from a first mortgagee who sold under a power of sale was held not to have defeated the title of the second mortgagee, and the second mortgagee was thus advanced to the position of having the first charge.

[LORD MACNAGHTEN referred to Davidson's Conveyancing, vol. 2, pt. 1, p. 324 (4th ed.), and to *Banks* v. *Whittall* (3).]

The same doctrine was enforced in *Parry* v. *Wright* (4) and *Brown* v. *Stead* (5). See also *Smith* v. *Phillips* (6); *Mangles* v. *Dixon* (7).

There was no intention to keep alive the mortgage to Miss Arnold; she called in her money and Searle was under an obligation to pay her off. If there was such an intention it was not expressed so as to defeat the rule of equity.

Haldane Q.C. and *F. Hoare Colt*, for the respondent, were not heard.

LORD HERSCHELL L.C.:—

My Lords, the question in the action was whether the respondent had made out a good title to sell. One objection, and one only, to that title was taken and argued before the Court of First Instance, and in this House I think it is not open to your Lordships to consider any other point but that single one so taken.

The property had originally belonged to a Mr. Piller. He mortgaged it in the first instance for the sum of £300. He then mortgaged it to a Mr. Forward for the sum of £150. Subsequently to that mortgage to Forward an arrangement was

(1) 1 D. M. & G. 240, 244.
(2) 6 D. M. & G. 638.
(3) 1 De G. & Sm. 536.
(4) 1 S. & S. 369; affirmed on appeal, 5 Russ. 142.
(5) 5 Sim. 535.
(6) 1 Keen, 694.
(7) 3 H. L. C. 702, 737.

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come to that the first mortgage of £300 should be transferred to a Miss Arnold, and that she should also have a further charge of £700, so that she became a mortgagee for £1000. It may be that as regards that £700 there was a priority on the part of Forward; but I do not think it will turn out that that is material so far as the question now to be determined is concerned. Afterwards there was a mortgage to Thorne, the appellant's testator. The mortgage transactions appear to have been carried out through the medium of Mr. Searle, a solicitor who acted for both sides, and he gave an undertaking to each of the mortgagees, by which he in effect guaranteed the mortgage, because he undertook either to take a transfer of the mortgage, or at his option to make good any deficiency which might arise on the realization thereof. None of the parties could insist upon his taking a transfer; but if he did not take a transfer they could each of them insist that if upon the realization of the security there was a deficiency he should make good that deficiency. Piller, the mortgagor, afterwards became bankrupt, and under his bankruptcy Searle bought the equity of redemption from the trustee in bankruptcy, and thus became the owner of it. Miss Arnold desired to receive the mortgage money. Accordingly she entered into communication with Mr. Searle with that object. Thereupon he, not having the money or not being prepared to advance the money himself, went to the Devon and Cornwall Bank, with whom he had an account, and obtained £1000 from them on a special advance with the view of obtaining the money to pay to Miss Arnold. At that time it would seem that he was in negotiation with a Mr. Cann with a view to his taking the mortgage; but it was a mere matter of negotiation and no absolute agreement had then been come to on the subject. But this is certain, that he obtained £1000 from the bank, and that it was the intention of himself and of the bank that the bank should receive the mortgage security which he was going to discharge. I think that is perfectly clear from the answers given by the bank manager (and there is nothing in Mr. Searle's evidence inconsistent with it) and from the documents put in. The bank manager says: "I knew nothing about Miss Arnold or Mr. Cann, because frequently he had got no client. I have had

many transactions with him. If a client asked him to pay off a mortgage he would come to the bank if he had not got another client ready, and we would wait until he had one." Now, what is the meaning of that but that they were to find the money to pay off the mortgagee? That is, they, advancing the money, were to have the benefit of the mortgage security until he found a new client who should afford the means of paying the money back to the bank, when that new client was to have the security. That obviously was the intention of both Mr. Searle and the bank. Under those circumstances he receives the money from the bank, and he pays Miss Arnold; he takes an instrument from her, to which I will call attention in a moment, and he deposits the deeds with the bank. A month or so afterwards Mr. Cann advances £900 and takes from Mr. Searle an assignment of the security.

The instrument executed by Miss Arnold witnesses that "in consideration of the sum of £1000 this day paid to the said Jane Owen Arnold by the said James Searle (the receipt whereof the said Jane Owen Arnold doth hereby acknowledge) she the said Jane Owen Arnold as mortgagee doth hereby assign unto the said James Searle his executors and assigns all that the said sum of £1000 now owing to the said Jane Owen Arnold on the security aforesaid, and all interest henceforth to accrue due for the same, and the full benefit of the covenants entered into by the said James Piller in the said indentures and of all other securities for the same premises, and all the estate and interest of the said Jane Owen Arnold in the premises and every part thereof." That was the nature of the instrument executed, and it purports, as will be seen, to assign the mortgage debt and all the securities held in respect thereof. I do not think, as I have already said, that it can for a moment be doubted, looking at the circumstances existing at the time when the money was paid to Miss Arnold and the instrument taken, that it was the intention of Mr. Searle to keep this security alive. It appears to me that such intention is indicated by the form of the instrument taken. I cannot myself conceive, when the owner of the equity of redemption paid Miss Arnold, the mortgagee, what was the object of his taking to himself the assignment of the mortgage

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debt, and all benefits and rights in respect of it, if it was not to keep alive that security.

Now, my Lords, that having been the intention which I infer from the instrument itself, and from the surrounding circumstances at the time, is that intention defeated by some rule of law which prevents effect being given to it? Reliance has been placed by the learned counsel for the appellant upon the case of *Toulmin* v. *Steere* (1). That is a case which certainly has not met with universal acceptance: it has been often commented upon and criticised adversely. It appears that an appeal was contemplated, although circumstances rendered it unnecessary; and possibly the decision might be open to reconsideration in your Lordships' House. But it is not necessary to determine any such point on the present occasion, because if *Toulmin* v. *Steere* (1) be accepted as good law it does not, in my opinion, govern the present case. In *Toulmin* v. *Steere* (1) the owner of the equity of redemption had purchased the property with the intention of paying off all the mortgages upon it, and thought all the mortgages had been paid off out of the purchase-money. One mortgage had been omitted; but so far from the intention there being to keep any of the mortgages alive, the intention was to extinguish all the mortgages, and it was believed that such intention had been successfully accomplished.

In the case of *Adams* v. *Angell* (2), as here, the equity of redemption had been purchased from a trustee under a bankruptcy. The question was whether the mortgage security had been kept alive, and the principle laid down by Jessel M.R. in giving his judgment is this: "That in all these cases the question is one of intention; and looking at the terms of the deed, by the light of the surrounding circumstances, I am of opinion that an intention was clearly shewn not to let in Newsom" (the subsequent mortgagee in that case) "except on the terms of his paying Adams his principal, interest, and costs." My Lords, adopting that principle, I say here, looking at the terms of the deed, which, I think, would of themselves be sufficient where there is nothing pointing to the contrary, I am of opinion that the intention was to keep the security alive. It

(1) 3 Mer. 210.

(2) 5 Ch. D. 634.

seems to me one method, recognised by conveyancers, of expressing such an intention is to take an assignment of the mortgage security. But if you are to look at the terms of the deed, in the light of the surrounding circumstances, so far from these pointing the other way they all, to my mind, point in the same direction and indicate, beyond any possibility of dispute, that this was the intention.

Reliance has been placed by the appellant upon the documents, and among them the undertaking to which I have referred given by Mr. Searle. I do not think they militate against the respondent's case. It is said that they explain why it was that the transfer was taken from Miss Arnold in this form. They do; they shew that it was intended to be a transfer of the mortgage—as excellent a way of expressing the intention of the parties as could well be conceived.

For these reasons, my Lords, I think the judgment of the Court below is perfectly correct and ought to be affirmed, and the appeal dismissed with costs, and I move your Lordships accordingly.

LORD WATSON:—

My Lords, I concur. I am satisfied that it was the intention of James Searle, the owner of the equity of redemption, to keep on foot the mortgage which he acquired from Miss Arnold, and subsequently transferred to the respondent. I think that is a reasonable inference from the tenor of the documents by which these transactions were carried out, and the only inference consistent with the circumstances attending their execution.

That inference, in fact, is sufficient to dispose of this appeal. It seems clear that in such circumstances intention must prevail, notwithstanding the very doubtful authority of the rule laid down in *Toulmin* v. *Steere* (1).

LORD MACNAGHTEN:—

My Lords, I do not think there is any foundation for this appeal in principle or authority.

The case of *Toulmin* v. *Steere* (1), which was pressed into the

(1) 3 Mer. 210.

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service of the appellant, has not, as it seems to me, any application to the present case. The facts in the two cases are not the same, nor is there, I think, any real resemblance between them.

In *Toulmin* v. *Steere* (1) it was decided that a purchaser who took a conveyance purporting to be free from incumbrances could not set up a mortgage which had been paid off out of the purchase-money against an incumbrance subsequent in date of which he had constructive notice. The authority of that case cannot nowadays be treated as going beyond the actual decision. Whether it would be regarded as a binding authority in a case on all-fours with it, except in a Court of First Instance, is at least doubtful. It would not, I think, on the present occasion be proper to go beyond what has been said about it in *Stevens* v. *Mid-Hants Railway Company* (2) and *Adams* v. *Angell* (3). But I may remind your Lordships of an observation which was made by James L.J. in the former case, and which is not, I think, without application to the case now before your Lordships. "Of course, it is quite right," said his Lordship, "that an intermediate incumbrancer should not be prejudiced by any dealings between his debtor and another incumbrancer. At the same time it is not for this Court to find some recondite technical reason for giving a man a benefit at the expense of another man who was under no liability whatever to pay him."

The material facts in this case are very simple. When Searle agreed to buy the equity of redemption from Piller's trustee in bankruptcy he became the owner of the estate subject to certain charges. The debts which those charges were intended to secure were not his debts, nor was he personally liable to pay them. I do not forget the undertakings which Searle had given. But those undertakings did not make the debts his or bind him to pay so that he could be sued as debtor. There was nothing inconsistent with Searle's duty to Thorne in his performing his undertaking to Miss Arnold.

Nothing, I think, is better settled than this, that when the owner of an estate pays charges on the estate which he is not personally liable to pay, the question whether those charges are

(1) 3 Mer. 210. (2) Law Rep. 8 Ch. 1064.
(3) 5 Ch. D. 634.

to be considered as extinguished or as kept alive for his benefit is simply a question of intention. You may find the intention in the deed, or you may find it in the circumstances attending the transaction, or you may presume an intention from considering whether it is or is not for his benefit that the charge should be kept on foot. Here, I think, the intention appears plainly on the face of the deed by which Miss Arnold purported to transfer her mortgage. There is no release of the debt. Payment is not acknowledged simply. But the debt is assigned. The mortgage is transferred. The power of sale and other powers are kept alive. To put it shortly, it is a transfer and not a reconveyance.

If it were necessary to look at the circumstances attending the transaction, it seems to me that the dealings with the bank and the negotiations with Cann which began before Miss Arnold was paid shew the intention clearly enough. These dealings and transactions would have been simply a fraud on the part of Searle if it had not been his intention to keep the charge alive.

Moreover, if it were necessary to consider the point, it was plainly for the benefit of Searle to keep Miss Arnold's mortgage on foot. On these broad grounds, without considering any special equity to which Mr. Cann may be entitled, I think the decision of Romer J., affirmed by the Court of Appeal, is quite right, and I am of opinion that the appeal should be dismissed with costs.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals 19th November 1894.

Solicitors for appellant: *Mear & Fowler, for G. H. Thorne, Nottingham.*

Solicitors for respondent: *Torr, Gribble, Oddie, & Sinclair, for C. T. K. Roberts, Exeter.*

[HOUSE OF LORDS.]

H. L. (E.) 1894 Dec. 17.

FRANZ HANFSTAENGL . . . . . APPELLANT;

AND

H. R. BAINES & CO. LIMITED AND E. J. MANSFIELD . . . . . RESPONDENTS.

Copyright—Pictures—Infringement—Sketches from Living Pictures—Publication in Newspaper—Fine Arts Copyright Act 1862 (25 & 26 *Vict. c.* 68) *ss.* 1, 2, 6.

Observations upon the meaning of the terms "copy," "reproduction" and "colourable imitation" of an original picture "or of the design thereof," used in the Fine Arts Copyright Act 1862 (25 & 26 Vict. c. 68) ss. 1, 6.

The decision of the Court of Appeal ([1894] 2 Ch. 1) affirmed on the ground that, looking at the variations between the original pictures and the sketches, the sketches were not in fact copies, reproductions, or colourable imitations of the original pictures or of the designs thereof and did not constitute an infringement of the copyright within the Act.

THE appellant was the owner of copyright according to German law in certain pictures painted in Germany. At the theatre of the Empire Palace Limited in London representations were given of these pictures by groups of living persons, and sketches of these Living Pictures were published by the respondents in the *Daily Graphic* newspaper (of which they were the proprietors and publisher respectively) with explanatory letterpress. The appellant brought an action against the Empire Palace Limited and the respondents to restrain them from infringing his copyright by their respective representations, and for damages.

Upon the motion for an injunction against the Empire Palace Limited the Court of Appeal (Lindley, Kay and A. L. Smith L.JJ.), affirming the decision of Stirling J., held that the Living Pictures were not an infringement of the copyright (1).

Upon the motion for an injunction against the present respondents (with which alone the present appeal is concerned) Stirling J. granted an interim injunction. This order was dis-

(1) [1894] 2 Ch. 1.

charged by the Court of Appeal (Lindley, Lopes and Davey L.JJ.), and (the parties agreeing to treat the appeal as if it were from a judgment at the trial of the action) the action was dismissed as against the present respondents (1). From this decision the plaintiff appealed.

No question of international law was argued on this appeal, it being assumed for the purpose of argument that the appellant was entitled to the copyright in the original pictures according to English law.

1894. Dec. 3. *Finlay* Q.C. and *T. E. Scrutton* (*A. H. Jessel* with them) for the appellant :—

Copies or reproductions may be unlawful though made not directly from the original, but from another kind of copy or imitation which is not in itself forbidden. It was so held by Stirling J., and admitted by the Court of Appeal, who decided against the appellant on other grounds. The fact that the object of the respondents was not to copy or reproduce the appellant's pictures, but to give the public an account of what was going on at the Empire Palace, is immaterial if in fact the *Daily Graphic* pictures are copies of the appellant's pictures. The terms of the Copyright Act 1862 s. 1 are very wide, and confer "the sole and exclusive right of copying, engraving, reproducing and multiplying such painting or drawing and the design thereof." Thus the appellant is protected, notwithstanding variations of detail or treatment, if "the design" is copied, and the design of these pictures has been copied. The owner of a picture may suffer by its vulgarisation, as in *Hanfstaengl Art Publishing Company* v. *Holloway* (2). In *Ex parte Beal* (3) it was held that it made no difference whether the copy was directly from the pictures or through intervening copies. To the same effect is *Turner* v. *Robinson* (4). The respondents have copied the appellant's pictures within the definition of a copy given by Bayley J. in *West* v. *Francis* (5). *Dicks* v. *Brooks* (6) was not a case under the Act of 1862, and has no application.

(1) [1894] 3 Ch. 109.
(2) [1893] 2 Q. B. 1.
(3) Law Rep. 3 Q. B. 387, 394.
(4) 10 Ir. Ch. Rep. 121, 510.
(5) 5 B. & Ald. 737.
(6) 15 Ch. D. 22.

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Closeness to the original is not the conclusive test. If the question were to be determined by the mere degree of imitation, roughness, inadequacy and inaccuracy of the copy might deprive the owner of the copyright of the protection to which he is entitled.

Crackanthorpe Q.C., *Grosvenor Woods* Q.C. and *H. A. Forman* for the respondents were not heard.

The House took time for consideration.

1894. Dec. 17. LORD HERSCHELL L.C.:—

My Lords, the plaintiff is the owner of the copyright in certain paintings. Some points were raised as to his title, but as, in the view which your Lordships take, it has not been found necessary to argue them, he must be assumed to have all the rights which are conferred by the Copyright Acts.

An exhibition took place on the stage of the Empire Theatre of what were called Living Pictures. These were formed by living persons who had assumed the dress, attitude, and position of the figures to be found in the plaintiff's copyright paintings, and had been placed as far as possible in apparently the same surroundings. In short, the Living Picture was intended to be a representation of the artist's work.

The defendants are the publishers of the *Daily Graphic* newspaper. They published, in their issue of the 8th of February 1894, sketches of the Living Pictures, taken by one of their artists. These were accompanied by an account of the performance, and were intended to convey information by pictorial means of the entertainment to be witnessed at the theatre. The plaintiff complains that the sketches so published constitute an infringement of his copyright. Stirling J. came to this conclusion; but the Court of Appeal reversed his decision, and gave judgment for the defendants.

The copyright in paintings is regulated by the 25 & 26 Vict. c. 68, which, by sect. 1, confers the sole and exclusive right of copying, engraving, reproducing, and multiplying the painting and the design thereof; and by sect. 6 imposes a penalty on any person who shall, without the consent of the proprietor of

the copyright, "repeat, copy, colourably imitate, or otherwise multiply for sale, hire, exhibition or distribution, or cause or procure to be repeated, copied, colourably imitated, or otherwise multiplied for sale, hire, exhibition or distribution, any such work or the design thereof."

The plaintiff's counsel felt it difficult to say that the alleged infringement was a copy or reproduction or multiplication of the plaintiff's paintings, but they relied on the words "or of the design thereof." And I think that the plaintiff cannot succeed in this action unless he can shew that the defendants have copied the design of some or one of his paintings.

It is obvious that the plaintiff cannot successfully claim to have a monopoly of every treatment of such common subjects as Love and Courtship, or Charity. I take these as examples. The paintings of which he alleges his copyright to have been infringed were all of this class, and it would be impossible to give the word "design," as used in the statute, so wide a meaning as to confer such a right as this. What is covered by that word must depend in each case upon the nature of the painting.

The plaintiff puts his case in this way. The Living Pictures exhibited at the Empire Theatre were, he says, copies from the paintings of which he owns the copyright, and the sketches published in the defendants' paper were copies of these Living Pictures; therefore they must be copies of the design, at least, of his copyright paintings.

It is not accurate to say that the Living Pictures were copies of the paintings. It is admitted that the faces, at all events, were different. It is not shewn that the countenances of the living persons who figured upon the stage bore any close resemblance to those depicted by the artist. In some cases this difference would be all-important. The skill of the artist might have been mainly devoted to this part of the picture, and the faces depicted might be of the very essence of the design. The other details might be so subordinated to these, that even if a drawing shewed some resemblance in other respects, yet if the faces were different no one would dream of saying that the one was a copy or reproduction of the other.

On the other hand, there might be cases where the grouping

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of the figures and their accessories might be more important in comparison, and a change in the countenances represented might leave the design of the painting substantially the same. It must always be a question of fact whether what is complained of as an infringement is a copy of the design. I mention these merely as illustrations. It is impossible to lay down any hard and fast rule.

I am far from saying that what is called a Living Picture might not be so arranged to represent an existing painting that a photograph or drawing of the Living Picture would be a copy of the design of that painting. All I say is that this must depend upon the character of the picture, and what is justly to be regarded as its design.

My Lords, it is not necessary to refer in detail to each of the sketches of which complaint is made. It is admitted that the one most favourable for the plaintiff's case is that representing "Courtship." If he cannot succeed in shewing that this sketch infringes his copyright, it is out of the question that he should be entitled to relief in respect of any of the others. There is no doubt a resemblance between the sketch and the photograph from the painting. In each case a young man and a young woman are standing beside one another close to a stile or fence. In each case the woman is shading her head by a parasol, and the dress of the man is somewhat similar in the two. The idea suggested is, of course, the same—each represents "Courtship"; but the idea of a young man courting a young woman at a country stile is of great antiquity. It has often formed the subject of pictorial representation. This cannot be said to be the design of the plaintiff's painting within the meaning of the Act. Much more must be comprehended than this. There can only be a copy of such a design if the treatment of the subject be the same. Now, comparing the sketch with the photograph from the painting, I do not think this can be said to be the case. The faces are different; the mode in which the woman's hair is arranged is different; the dress, especially in the case of the woman, is different; the pose is different; the attitudes are different; the background is different, and in the case of the sketch the foreground is wanting. In the artist's design all

these things play a part, and, though I do not say that a variation in one or even more of these respects would prevent the sketch being a copy of the design, yet comparing the two, and considering the design of the painting as a whole, I cannot avoid the conclusion that the sketch is not a copy of the painting or of the design thereof, and therefore that there has been no infringement.

My Lords, it is difficult, if not impossible, to put into words all the reasons which lead to the conclusion arrived at on such a question as that now before your Lordships. I have tried to indicate some of those which have led me to my conclusion; but it depends really on the effect produced upon the mind by a study of the picture, and of that which is alleged to be a copy of it, or at least of its design.

I think the judgment of the Court of Appeal should be affirmed, and the appeal dismissed with costs.

LORD WATSON:—

My Lords, the appellant has acquired the copyright of four pictures by foreign artists, entitled "First Love," or "Courtship," "Loves me, loves me not," "Charity," and "Pets," which he has reproduced and sold in this country as engravings or photographs; and he complains in this action that the respondents have published in the *Daily Graphic* certain sketches which he alleges to be copies or colourable imitations of these copyright works.

In both Courts below it was matter of controversy whether, under Her Majesty's Order in Council of the 28th of November 1887, the appellant can claim the full privileges conferred by the Act 25 & 26 Vict. c. 68. The learned judges of the Appeal Court did not decide the point. They dealt with the case upon the assumption that the appellant was entitled to all the protection which is afforded by the Act, and they refused to grant an injunction, on the ground that none of the sketches complained of constituted an invasion of his copyright. The argument addressed to this House proceeded upon the same assumption; and I understand all your Lordships to be of opinion that the decision of the Court of Appeal is right.

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The only question which your Lordships have found it necessary to determine appears to me to be mainly one of fact. It is, no doubt, necessary to ascertain the import of the statutory prohibition before considering whether it has been contravened; and so far legal construction may be involved. But the ascertainment of the statutory rule is, in my opinion, a very simple matter in comparison with the task of determining, in some cases, whether, in point of fact, one picture or drawing is a colourable copy, or represents the design of another.

Sect. 1 of the Act of 1862 gives to the author of an original painting, drawing, and photograph, and his assigns, the sole and exclusive right of "copying, engraving, reproducing and multiplying such painting or drawing, and the design thereof, or such photograph, and the negative thereof, by any means and of any size," for the term of his natural life, and for seven years after his death. For the protection of the right thus conferred, sect. 6 enacts penalties against any person who, not being the proprietor for the time being of "copyright in any painting, drawing, or photograph," shall, without the consent of such proprietor, repeat, copy, colourably imitate, or otherwise multiply "any such work, or the design thereof." It will be noticed that the language of the statute expressly forbids, not only copies and colourable imitations of the copyright work, but all reproductions of the design of such work. I do not doubt that the addition of the words relating to design was intended by the Legislature to reach invasions of copyright which might possibly escape the imputation of being copies or colourable imitations of the work itself, and yet appropriated and incorporated the substance of what is described as the design of the work.

The possibility of laying down any canon which will afford in every case a useful test of what constitutes a copy or colourable imitation of the work or its design is, in my opinion, very doubtful. At all events, it is much easier to arrive at what does not than to define what does constitute a proper test. Thus, it is clear that the statute does not exempt copies or imitations which do not reproduce the artistic or inartistic qualities of the original. A slavish copy of a picture or drawing may be utterly wanting in the artistic merit exhibited by the original; and a

copy, by an eminent hand, may display merits which the original does not possess. But the one is as much prohibited as the other.

The language of Bayley J. in *West* v. *Francis* (1) comes nearer to a definition of what constitutes copying than anything which is to be found in the books. It runs thus: "A copy is that which comes so near to the original as to give to every person seeing it the idea created by the original." The learned judge was construing, for the purposes of the case before him, the provisions of 17 Geo. 3, c. 57, which differ in expression from the enactments of 25 & 26 Vict. c. 68, and contain no reference to reproducing the design of the protected work. As I read the later statute with which we have to deal in this case, the idea created by a picture or drawing does not necessarily form an element in the original work, or its design, which is protected by copyright. The same idea which is suggested by the copyright work may be expressed by another painting or drawing which is in no sense a copy, and does not borrow its design. To take, by way of illustration, the appellant's picture of "First Love," or his photograph of it which was chiefly relied on, as shewing, when compared with the respondents' sketch, an invasion of copyright, the idea conveyed by his copyright picture and its photograph is simply love-making (why it should be "first love" is not very apparent), and the medium selected for its conveyance is a representation of two figures, male and female, standing in close proximity to each other, and to a rustic stile. It can hardly be seriously maintained that no other artist is at liberty, without the appellant's leave, to suggest the same sentimental idea, by grouping together, in the neighbourhood of a stile, two individuals of opposite sexes having no resemblance either in personality, dress, or attitude to the loving pair who are the chief feature of the appellant's photograph.

In all cases where the alleged invasion is not a mere copy, the statute makes it imperative to consider how far there is identity of design. But the design which the Legislature had in contemplation is, to my mind, a very different thing from the idea created by the copyright work. So far as I can judge, the expression "design," as it is used in the statute, means nothing

(1) 5 B. & Ald. 737.

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more than the particular forms and arrangements (whether of lines or colouring) which the copyright author has selected as the vehicle for conveying his idea to those who see his work. There may very well be—I can see no reason to doubt that there are—cases in which his design, and the idea to which it gives birth, are both of them so novel and exceptional that it would be difficult, if not impossible, for another author to create the same idea without trenching upon his design. When that occurs, Bayley J.'s definition might come very near to the mark. But in cases where copyright is claimed for pictures or drawings which treat an old and common subject, such as love-making beside a stile, the privilege of the author must, in my opinion, be strictly confined to the particular design which he has chosen.

I refrain from applying these observations to the facts of the present case, because I accept without reservation the comments which have already been made by the Lord Chancellor.

The respondents relied, to some extent, in their argument upon the fact that their sketches were not taken from the appellant's copyright works, but from scenes represented by living actors; and that they were merely intended to inform the public of what might be seen at the Empire Theatre. I agree with Lindley L.J. that the circumstance is one of the facts of the case which ought to be taken into consideration. It clearly evidences that the respondents had not the animus furandi. At the same time, I am of opinion that it would not be available as a defence to the present action if it were shewn that their sketches, intended to represent Living Pictures, were de facto either copies of the appellant's copyright works or embodiments of their design. Having, however, come to the conclusion that these sketches are not copies, and do not reproduce the design of the works in question, I concur in the judgment which has been proposed.

LORD ASHBOURNE:—

My Lords, I concur.

The question is largely one of fact: Are the sketches in the *Daily Graphic* such copies of the pictures of the plaintiff, or

such reproductions of their designs, as are prohibited by the statute? I arrive clearly at the conclusion that they are not. We have had the advantage of seeing excellent photographs of the pictures and also copies of the *Daily Graphic* with the sketches complained of, and with every opportunity, assisted by the able arguments of the appellant's counsel, of making comparison, I cannot regard the sketches as copies or reproductions of the designs.

The subjects dealt with in the pictures are not special or exceptional: they deal with ideas as old as the world, and it would be impossible, as pointed out by the Lord Chancellor, to hold that the plaintiff could claim anything like a monopoly in every treatment of such common subjects. The idea of the representation at the Empire, as pointed out in the Court of Appeal, was no doubt suggested by the plaintiff's pictures, and the representation was made as exact as could be with such materials as were procurable. But ideas of such subjects are different from copies and designs; and the Lord Chancellor has pointed out many differences between the sketches and the pictures.

Although an innocent intention would afford no defence if the protection given by the statute was clearly infringed, yet it is well to bear in mind that the sketches were intended to represent what could be seen at the Empire Theatre, and were not intended as copies or to reproduce the designs of the plaintiff's pictures. As a fact, I arrive at the conclusion that they are not such copies or reproductions.

LORD MACNAGHTEN:—

My Lords, I am of the same opinion.

If the object of the Act of 1862 be, as I suppose it is, to protect the reputation of the artist and to preserve intact the commercial value of the artist's work, it appears to me that the sketches in the *Daily Graphic* which are complained of are not within the mischief which the Act was designed to repress. They cannot I think by any possibility have any injurious effect on the artist's reputation, nor can they I think under any conceivable circumstances detract in the slightest degree from the

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commercial value of the artist's work, or come into competition with it, or any reproduction of it. It is quite enough, as it seems to me, to place the sketches in question alongside any photograph of the pictures of which they are alleged to be piratical copies.

In these circumstances, in a case in which there has been no unfair use and no copying of anything which the artist can claim as his, I think it would be straining the Act unduly and using it to no good purpose if your Lordships were to hold the plaintiff as against the respondents entitled to any relief under the provisions of the Act.

LORD SHAND:—

My Lords, I agree in thinking that the present appeal ought to be dismissed for the reasons which have been stated by your Lordships.

It seems to me to be clear that a painting, drawing, or engraving may be a copy or reproduction of the work of another though it has not been made directly from that work itself, but by the use of intermediate copies or other indirect means such as the Living Pictures which were exhibited in the present instance, and which were intended to give a close representation of the paintings, the copyright in which is assumed to belong to the appellant. Whether the particular painting or drawing complained of is a copy or reproduction of another picture "or the design thereof" is a question of fact, and it is not easy, if indeed possible, to formulate the considerations which must be taken into view in all cases in answering the question.

The inquiry involves a comparison between two works. The idea of the original—the subject and the treatment of it in all its details—the grouping and dress of the figures—in some cases the expression as intended to convey feelings it may be of resignation, horror, pity, revenge, or the like—the background, and the accessories generally must be taken into account in the comparison to be made. In some cases the peculiar and distinguishing feature of the work the copyright of which is said to have been infringed may be in the special nature of the subject and its mode of treatment, apart from minor accessories

of detail which may be of a very subordinate character. All that can I think be said is that the question of infringement of the right depends on the degree of resemblance. It must be solved by taking each of the works to be compared as a whole and determining whether there is not merely a similarity or resemblance in some leading feature or in certain of the details, but whether, keeping in view the idea and general effect created by the original, there is such a degree of similarity as would lead one to say that the alleged infringement is a copy or reproduction of the original or the design—having adopted its essential features and substance.

I concur in thinking that there are such essential differences between the sketches or illustrations complained of and the paintings belonging to the appellant that the former cannot be regarded as copies or reproductions of the paintings or of their design.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals 17th December 1894.

Solicitor for appellant: *Herbert Bentwitch.*
Solicitor for respondents: *Basil Thomas.*

[HOUSE OF LORDS.]

H. L. (E.) 1894 Nov. 15.

THURSBY AND ANOTHER . . . . . APPELLANTS;

AND

THE CHURCHWARDENS AND OVERSEERS OF THE PARISH OF BRIERCLIFFE-WITH-EXTWISTLE IN THE COUNTY OF LANCASTER . . . . . RESPONDENTS.

Local Government—Rates—Lighting Rate—Coal Mines—"Land"—"Houses, Buildings and Property other than Land"—Poor Relief Act 1601 (43 *Eliz. c.* 2) *s.* 1—*Lighting and Watching Act* 1833 (3 *&* 4 *Wm.* 4 *c.* 90) *s.* 33.

For the purposes of a rate under the Lighting and Watching Act 1833 (3 & 4 Wm. 4 c. 90) coal mines are not "land" but are "property (other than land) rateable to the relief of the poor" within the meaning of sect. 33, and are therefore rateable on the higher scale, though they cannot derive any benefit from the rate.

The decision of the Court of Appeal ([1894] 2 Q. B. 11) affirmed.

APPEAL from an order of the Court of Appeal (1).

The following facts were stated in a special case under 12 & 13 Vict. c. 45 s. 11 for the opinion of the Court.

In March 1892 the ratepayers of a portion of the township of Briercliffe-with-Extwistle in the county of Lancaster (hereinafter called "the respondents' township") duly adopted the provisions of the Lighting and Watching Act 1833 (3 & 4 Wm. 4 c. 90), with respect to lighting, and in February 1893 the respondents made a rate for the purposes of the Act of 1833 on the owners and occupiers of property in the respondents' township.

The appellants, having been rated in respect of their coal mines on the higher scale at which under the provisions of sect. 33 of the Act of 1833 the owners and occupiers of houses, buildings and property other than land were rated in the respondents' township, appealed to quarter sessions.

The appellants' rated premises consisted of underground coal mines, 500 feet at least below the surface, and having no shaft or opening to the surface within the respondents' township. The

(1) [1894] 2 Q. B. 11.

coal gotten in the respondents' township was taken by underground ways or passages into the adjoining township and borough of Burnley, where it was brought to the surface.

All the pit shafts or openings to the surface and all houses, buildings and erections and property of a like nature used in connection with the getting of the coal gotten in the respondents' township were situated in the township and borough of Burnley, where they were assessed and rated to the poor, sanitary, lighting, and other rates. The appellants had no houses or buildings or property of a like nature in or in connection with the mines in the respondents' township. Their property in that township consisted wholly of underground workings and ways which were not and could not be lighted in any way by the lighting of the township.

If the Court should be of opinion that the coal mines were liable to be rated on the higher rate chargeable by the Act of 1833 the appeal was to be dismissed with costs.

The Queen's Bench Division (Mathew and Collins JJ.) entered judgment for the respondents (1), and this decision was affirmed by the Court of Appeal (Lopes and Davey L.JJ., the latter hesitating (2)).

By 43 Eliz. c. 2 s. 1, the overseers of the poor are to raise moneys for the relief of the poor "by taxation of . . . every occupier of lands, houses, tithes impropriate or propriations of tithes, coal mines or saleable underwoods."

By the Lighting and Watching Act 1833 (3 & 4 Wm. 4 c. 90) s. 33 the overseers of the poor of any parish to which the provisions of the Act shall be extended "shall for the purpose of collecting, raising and levying the rate necessary for the purposes of this Act, proceed in the same manner and have the same powers, remedies and privileges, as for levying money for the relief of the poor in the said parish; provided always that owners and occupiers of houses, buildings and property (other than land) rateable to the relief of the poor in any such parish shall be rated at and pay a rate in the pound three times greater than that at which the owners and occupiers of land shall be rated at and pay for the purposes of this Act . . . ."

(1) [1894] 1 Q. B. 567. (2) [1894] 2 Q. B. 11.

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Nov. 13, 15. *Balfour Browne* Q.C. and *William Graham* for the appellants :—

The appellants are entitled to be rated on the lower scale under the Act of 1833. The 43 Eliz. which is an Act for the relief of the poor has no direct bearing ; the statute under which the rate is levied deals with watching and lighting and not with relief of the poor. The ground of taxation is benefit received, not as in the case of the poor, burden imposed in proportion to ability. A mine cannot be benefited by lighting and watching ; it is not ejusdem generis with houses and buildings, and does not require the same amount of protection. It is land, and not the less so because it is below the surface. The Act of Elizabeth is not in pari materiâ and the language is not the same as that of 3 & 4 Wm. 4. The words "houses and buildings" do not occur in the former Act. All quarries are rated as land, and there is nothing either in the Act of Elizabeth or in the Lighting and Watching Act to place quarries in a different category from mines. The Courts have never said that coal mines were not land : but from language never intended to have such an effect, an illegitimate inference has been drawn that coal mines alone are subject to the higher assessment. In the statute of Elizabeth there is a simple enumeration of taxable property : "lands, houses, tithes impropriate, propriations of tithes, coal mines or saleable underwood." Thus all mines except coal mines were exempt from that Act. So lead mines in *Lead Company* v. *Richardson* (1), iron mines in *Morgan* v. *Crawshay* (2) in the House of Lords, and all mines except coal mines, *R.* v. *Sedgley* (3) have been held not chargeable to poor-rate. The Rating Act 1874 (37 & 38 Vict. c. 54) s. 3 sub-s. 3 makes liable to poor-rate "mines of every kind not mentioned" in the Act of Elizabeth. Thus for the purpose of lighting and watching coal mines are treated like houses and buildings, and other mines like land : a result which could never have been contemplated by the Legislature.

In *Reg.* v. *Southwark and Vauxhall Water Company* (4) the company were held, in respect of their pipes, to be rateable at

(1) 3 Burr. 1341.
(2) Law Rep. 5 H. L. 304 ; 40 L. J. (M.C.) 202.
(3) 2 B. & Ad. 65, 73.
(4) 6 E. & B. 1008.

the lower rate, as occupiers of lands, and Lord Campbell C.J. observed that the object of the Legislature "was that the higher rate should be thrown on the class of property which derives superior benefit from lighting, and the lower rate on the class which derives less benefit." In *Reg.* v. *Neath* (1) a canal and towing-path were held rateable as land; also bridges and a dry dock as being accessories to the canal. So a line of railway was held to be "land" in *Reg.* v. *Midland Railway Company* (2). On the other hand, in *Peto* v. *West Ham* (3), Lord Campbell C.J. and Wightman and Crompton JJ. held that a wet dock and tidal basin were assessable at the higher rate like houses, but Erle J. dissented, holding that they were "land," though covered by water. The majority of the Court made the distinction between land used for commercial and land used for agricultural purposes; but all the judges held that the governing consideration was the greater or less benefit received from lighting and watching. The test is, is the property ejusdem generis with houses and buildings?

The true principle of construction applicable to a statute which involves a reference to an earlier statute, was expressed by Jessel M.R. in *Ex parte Blaiberg* (4): "The proper course is to read the section of the Act and to ascertain its meaning, and not to trouble ourselves about decisions upon the former Act; any other course would be apt to lead us astray." Interpreting the Act of 1833 as it stands, no one would place mines in the same class as houses and buildings.

Castle Q.C. and *William Mackenzie* for the respondents were not heard.

LORD HERSCHELL L.C.:—

My Lords, this is an appeal from a judgment of the Court of Appeal affirming a judgment of the Divisional Court. The point is a very simple one, whether, under the Lighting and Watching Act (3 & 4 Wm. 4 c. 90) s. 33 a coal mine is to be rated at the

(1) Law Rep. 6 Q. B. 707.
(2) Law Rep. 10 Q. B. 389.
(3) 2 E. & E. 144; 28 L. J. (M.C.) 240.
(4) 23 Ch. D. 254, 258.

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higher rate provided for by that section or at the lower rate. The section provides "that owners and occupiers of houses, buildings, and property (other than land) rateable to the relief of the poor in any such parish shall be rated at and pay a rate in the pound three times greater than that at which the owners and occupiers of land shall be rated at and pay for the purposes of this Act." The contention on the part of the appellants is that a coal mine is land, and therefore falls to be rated at the lower rate. The contention of the respondents, which has been given effect to by the Court below, is that a coal mine is not land within the meaning of that provision, and therefore is to be rated at the higher rate.

No doubt in a broad sense the word "land" may be said to include a mine; but it is equally certain that the word is sometimes used in a more limited sense which would not include a mine. In the present case I think the sense in which the word "land" must be interpreted is pointed out for us by the Legislature. The 33rd section commences by an enactment "that the overseers shall, for the purpose of collecting, raising and levying the rate necessary for the purposes of this Act, proceed in the same manner and have the same powers, remedies and privileges as for levying money for the relief of the poor in the said parish." And by the 9th section of the same Act the sum necessary for lighting and watching was "to be raised upon the full and fair annual value of *all* property rateable for the relief of the poor within the parish." The effect of those provisions was to extend the rating power given by the statute of Elizabeth, which was there confined to a rate for the relief of the poor, to a rate for the purposes of lighting and watching. The property rateable was made the same, and the methods of rating were made the same. In fact, except that the purpose was different, the overseers were to proceed in precisely the same way in raising the rate for the lighting and watching purpose as they had done for the relief of the poor.

The particular part of the section which has to be construed is a proviso upon the earlier part of the section which enacts that the overseers "shall proceed in the same manner" "as for levying money for the relief of the poor." Having regard to

those facts it seems to me to be impossible to do otherwise than to hold that the word "land" is used in this enactment in the same sense in which it is used in the statute of Elizabeth. The whole legislation is but a development of the legislation which had its orgin in the statute of Elizabeth.

I turn, then, to the statute of Elizabeth to see in what sense the word "land" is used. The Legislature there describes the subjects to be rated, and provides in the first clause that the rate shall be assessed on "every occupier of lands, houses, tithes," "coal mines, or saleable underwoods." A question was raised many years ago whether mines other than coal mines were rateable. It was held that they were not, on account of the specific mention of coal mines as a subject of rating. Of course the contention that they were rateable would rest upon this, that the word "lands" was large enough to cover them. That was undoubtedly true; but it was nevertheless decided—ultimately in this House—that the specific mention of coal mines as a subject of rating shewed that the Legislature did not intend other mines to be rated. If so, it shewed, as it seems to me, that the word "lands" in the statute of Elizabeth was used in its more restricted and limited sense so as to exclude all mines. Of course coal mines being specifically mentioned were rated, not by the use of the word "lands" but by their express inclusion. Other mines were not rated because the express provision relating to coal mines shewed that the word "lands" was not used in a sense which would include them. Ever since that time coal mines have been rated conformably to the statute of Elizabeth. They are rateable not as lands, but as coal mines; and in rating them for the purposes of the Lighting and Watching Act the overseers, proceeding in the same method as has been usual under the statute of Elizabeth, would rate them not as lands but as coal mines. When, therefore, we have such an enactment as that under consideration dealing with this rating, dividing into classes the rateable subjects under the statute of Elizabeth, and when we find in one of those categories "lands," it seems to me that that category cannot include anything more than the word "lands" included in the statute of Elizabeth, and therefore it follows, I think,

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that it cannot include coal mines. My Lords, it is upon that simple ground that I desire to rest my opinion.

The particular point now under consideration has not previously been before the Courts. It cannot be denied that there are dicta in some of the cases to which reference has been made which indicate the view that the word "property" in the statute is not to be interpreted as a general word sweeping in everything else besides those things specifically mentioned, namely "lands" in the one category, and "houses and buildings" in the other, but that it is to be read in a limited sense as confined to things ejusdem generis with houses and buildings; and it was said that inasmuch as coal mines are not ejusdem generis with houses and buildings they cannot be within the word "property" and therefore they must be within the word "land." My Lords, it seems to me that there is this complete answer, without deciding how the word "property" is to be interpreted. In the case of tithes the word "lands" cannot cover them; they would not fall properly within such a term; and if "property" is to be read in a sense ejusdem generis only with houses and buildings it cannot be said that tithes are ejusdem generis with either houses or buildings, and therefore it follows that tithes are not inserted in either of these categories.

If "property" is to have the narrow construction contended for, then all that would result is that from the higher category certain things have been omitted, but that nevertheless as they are not included in the word "land," and as everything is to be rated which is rated under the statute of Elizabeth, somehow or other they must fall within that higher category because they do not come within the excepted category of "land," which is to be rated at the lower rate. My Lords, I confess I think the argument tends strongly to shew that it is impossible in the case of this statute to confine the word "property" to something ejusdem generis with "houses and buildings." But however that may be, it is sufficient to say that the appellants, in order to succeed, must bring their case within the word "land." For the reasons which I have given I think they have failed to do so.

It is not really necessary to enter upon a discussion of the

cases to which reference has been made (they have given rise to a good deal of difference of opinion amongst the learned judges who have taken part in them) because, for the reasons which I have given, they do not seem to me any of them directly to bear upon the case which your Lordships have to decide, although the dicta with reference to the sense in which the word "property" is used have been, naturally and properly, much relied on by the learned counsel for the appellants.

For these reasons I move your Lordships that the judgment of the Court below be affirmed, and the appeal dismissed with costs.

LORD WATSON:—

My Lords, I also am of opinion that the judgment of the Court below ought to be affirmed; my reasons may be very shortly stated. We have to construe in this case a statutory proviso applicable to an assessment imposed in terms of the Act of Elizabeth, and I am of opinion that the expressions in the proviso were intended by the Legislature, and must be taken to have the same meaning which they bear in the older statute. If that view be right, a coal mine, not being "land" within the meaning of that statute, comes within the description of "property other than land' in the proviso.

LORD MACNAGHTEN:—

My Lords, I concur.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals 15th November 1894.

Solicitors for appellants: *Littledale & Lefroy for Artindale & Southern, Burnley.*

Solicitors for respondents: *Warriner & Kinch for T. Nowell, Burnley.*

[HOUSE OF LORDS.]

H. L. (E.) 1894 Dec. 17.

W. N. WHITE & CO., LIMITED . . . APPELLANTS;

AND

FURNESS, WITHY & CO., LIMITED . . RESPONDENTS.

Ship—Bill of Lading—Freight—Liability from Receipt of Goods under Bill of Lading—Consignee—Lien—Deposit of Cargo with Warehouseman—Delivery of Goods—Merchant Shipping Act Amendment Act 1862 (25 & 26 *Vict. c.* 63) *ss.* 66–72.

Where cargo is deposited by a shipowner with a warehouseman under the Merchant Shipping Act Amendment Act 1862 ss. 66–72, subject to a stop for freight, and the consignee deposits the freight with the warehouseman and takes delivery of the goods from him, no contract by the consignee to be personally liable for the freight is to be inferred from his acceptance of the goods, and the Act creates no such personal liability.

In these circumstances a consignee, who is so named in the bills of lading but who has no property in the goods and takes delivery only as agent for the owner, cannot be sued for the freight.

The decision of the Court of Appeal ([1894] 1 Q. B. 483) reversed.

THE following statement of the facts is in substance taken from the judgment of Lord Herschell L.C.

Certain consignments of apples were shipped upon a vessel of the respondents to be carried to London. By the bills of lading the goods were to be delivered to the appellants, "freight and charges payable by the consignees as per margin." The appellants, although so named as consignees, were not persons to whom the ownership of the property passed by the bills of lading, but were merely agents for sale on behalf of the owners of the goods.

The vessel arrived in Victoria Docks on Sunday the 11th of December 1892. The appellants were not at the discharging berth ready to take delivery ex-ship. The master, under sect. 67 of the Merchant Shipping Act 1862, proceeded to land the apples into a warehouse of the London and India Docks Joint Committee, with a notice to the committee to detain the goods till payment of the freight.

On Monday the 12th of December the appellants sent to the

docks committee a letter inclosing a cheque for £152 17*s.* 1*d.*, being the full amount of freight under the bills of lading, as calculated by them. The cheque was inclosed in a letter in these terms: "Dear Sirs,—We herewith hand you cheque for freight under the Merchant Shipping Amendment Act c. 63 ss. 68, 69, 70, 71, 72, and request you to hold same pending the receipt of your landing account and our further instructions. Yours, &c., W. N. White & Co."

The amount of the freight payable under the bills of lading was, in fact, £148 16*s.* 3*d.*, the excess having been paid to the docks committee owing to a miscalculation. The appellants having thus made the deposit under sect. 70 of the Act, took delivery of the apples ex-warehouse. The respondents insisted that they were entitled to claim payment of the freight from the appellants. The latter maintained that having under the provisions of the Merchant Shipping Act paid the amount claimed to the docks committee they were entitled to delivery without any further payment, and were not liable to the respondents for freight. On the 13th of December the respondents brought the present action against the appellants.

On the 14th of December the appellants wrote to the docks committee directing them to pay to the respondents £148 16*s.* 3*d.*, the correct amount of the freight, less a sum of 15*s.* for three barrels "broken and plundered, at 5*s.* each." On the next day the docks committee tendered the respondents the sum of £148 1*s.* 3*d.*, which was refused, and the action was proceeded with. The appellants were ultimately allowed to defend the action upon payment into Court of £148 16*s.* 3*d.* to abide the event of the action, and this amount was paid into Court by the docks committee by arrangement between the parties.

The statement of claim was for £148 16*s.* 3*d.* for freight. After notice of trial had been given, the plaintiffs amended their statement of claim by claiming in the alternative "a declaration that they were entitled to a lien on the goods for the freight, and are now entitled to a lien upon and to the sum of £148 16*s.* 3*d.* paid by the defendants to, or deposited with," the docks committee in respect of the freight.

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In answer to this amendment the defendants said that they had no interest in the claim so put forward and had never resisted such claim.

Day J. who tried the action without a jury ordered judgment to be entered for the plaintiffs for £148 16*s.* 3*d.*, and this decision was affirmed by the Court of Appeal (Lindley and A. L. Smith L.JJ., Davey L.J. dissenting) (1). From these decisions the defendants brought the present appeal.

1894. Nov. 13. Sir *R. E. Webster* Q.C. and *Cranstoun* (*Channell* Q.C. with them) for the appellants:—

Where the consignee takes delivery from the ship under a bill of lading a contract to pay the freight may be inferred as a matter of fact, not of law: *Sanders* v. *Vanzeller* (2); and see *Young* v. *Moeller* (3); *Kemp* v. *Clark* (4). There the shipowner gives up his lien—an ample consideration for the promise to pay. But in circumstances like the present there is no consideration. By sect. 70 of the Merchant Shipping Act Amendment Act 1862 (25 & 26 Vict. c. 63) when the freight is deposited with the warehouseman the shipowner's lien is discharged. The acceptance of the goods therefore raises no presumption of fact that the consignee makes himself personally liable for the freight. The majority of the Court of Appeal thought that sects. 70, 72 created a personal remedy against the consignee. But sect. 72 contains no words to support such a contention, and sect. 70 merely preserves any remedy which the shipowner may have. In the present case the appellants, though named in the bills of lading, yet having no property in the goods and having made no actual contract to pay, incurred no liability, under 18 & 19 Vict. c. 111, or otherwise, to pay the freight. The shipowner's remedy is against the deposit.

Bigham Q.C. and *H. F. Boyd* (*Lewis Noad* with them) for the respondents:—

The respondents' contention is expressed in the judgment of Lindley L.J. By the terms of the bill of lading the freight was

(1) [1894] 1 Q. B. 483.
(2) 4 Q. B. 260, 295.
(3) 5 E. & B. 755.
(4) 12 Q. B. 647.

payable by the consignee on delivery, and a contract to pay the freight is implied by acceptance of the goods; that is the real consideration for the promise to pay. By sects. 69, 70, the owner of the goods may pay the shipowner directly or place the freight in medio. The effect of the latter course is to discharge the lien on the goods. But the consignees by accepting the delivery impliedly contracted to pay the freight. By enacting (sect. 66) that "owner of the goods" shall include any person entitled to the possession of the goods as agent, the Act shews an intention to place the liability of the agent on the same footing as that of the owner. Sect. 72 of the Act contemplates an action for the freight by the shipowner against the "owner of the goods," including an agent of the owner for sale.

[They referred to *Meyerstein* v. *Barber* (1), per Willes J., and to the cases cited in the Court of Appeal.]

The House took time for consideration without hearing a reply.

Dec. 17. LORD HERSCHELL L.C.:—

My Lords, the facts which have given rise to this appeal may be shortly stated. [His Lordship then stated the facts given above.]

The question therefore at issue between the parties, and the only question, was whether the appellants were liable under the circumstances to pay the respondents the freight claimed by them. The appellants were not parties to the original contract of carriage; they were not persons to whom the property in the goods had passed, and who were therefore liable under the Bills of Lading Act; but it is said that they incurred liability by taking delivery of the goods.

Now, it is not disputed that where a consignee takes delivery under a bill of lading, and the master of the vessel by giving delivery abandons his lien, there is evidence from which a contract to pay freight may be inferred. This has been regarded as the law ever since the case of *Sanders* v. *Vanzeller* (2); but in that case it was distinctly stated that it was not a presumption of law that such a contract existed, but only a presumption of

(1) Law Rep. 2 C. P. 38, 49. (2) 4 Q. B. 260.

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fact. Inasmuch as a shipowner is entitled to retain goods for the purpose of securing payment of his freight, it is only natural to infer if the goods are parted with to a consignee before the freight is paid, and the lien is thus abandoned, that it could only be on the understanding on both sides that the consignee undertook to pay the freight. And I cannot doubt that in such a case, except under very special circumstances, a jury, or whatever tribunal has to determine the facts, will always find that there was such a contract. But it must be borne in mind that it is only by reason of his lien that the shipowner is entitled to refuse delivery to the owner of the goods or his agent, and I think the abandonment of this right is an essential element in the facts which give rise to the inference of a contract to pay the freight.

In the present case the appellants did not receive the cargo from the shipowner, but from the dock company, in whose warehouses the master had deposited it. The goods were warehoused under sect. 67 of the Merchant Shipping Act Amendment Act 1862 (25 & 26 Vict. c. 63). By sect. 68 if the requisite notice is given to the warehouse owner the goods in his hands continue liable to the same lien as they were subject to before the landing, and the warehouse owner is bound to retain them until the lien is discharged in the manner mentioned in the Act.

Sect. 70 provides that the owner of the goods (in which term an agent for the owner entitled to the possession of the goods is included) may deposit with the warehouse owner a sum of money equal in amount to the sum claimed by the shipowner, and thereupon the lien shall be discharged, but without prejudice to any other remedy which the shipowner may have for the recovery of the freight.

Upon payment of the amount claimed, therefore, by the appellants to the dock company the lien of the shipowner ceased. Any remedy which the shipowner had for the recovery of his freight of course remained intact. But he had, beyond all question, at that time no remedy against the appellants. They afterwards took delivery from the dock company, and the question is, whether from this circumstance any contract is to be implied on their part to pay freight to the respondents.

My Lords, I am quite unable to see how, as a matter of fact, any such contract can be implied. In cases like that to which I have previously alluded, where the consignee takes delivery from the ship and the shipowner abandons his lien, the fair inference is that both parties intended that the consignee taking the delivery should become liable for the freight; but, under the circumstances with which I am now dealing, I am at a loss to see what there is to justify the inference that both parties so intended. There seems to me no reason why the consignee should in that case make, or be supposed to make, any promise to pay the freight; nor am I able to find any consideration to support such a promise. As soon as the shipowner's lien is discharged he ceases to have any right to the goods which lie in the warehouse. They are not his property; the only right which he ever had to them was a right of lien. They are the property of the owner of the goods, and the dock company would, as it seems to me, have no right to refuse to deliver them to the shipowner or to any agent authorized by him to demand them. How, then, can the receipt of the goods by the agent of the owner from the dock company, who are legally bound to deliver them, give rise to any inference of a promise, or afford the consideration for any promise by the consignee to pay freight to the shipowner?

If the only provisions of the Act had been those to which I have hitherto alluded, I do not think the Court below would have held that the appellants were liable for the freight. The conclusion at which the Court of Appeal arrived resulted, I think, from the construction which they put upon sect. 72 of the Act.

Sect. 71 provides that if the freight claimed is deposited with the warehouse owner, and the person making the deposit does not within fifteen days after making it give to the warehouse owner notice in writing to retain it, or any part of it, the warehouse owner may, at the expiration of such fifteen days, pay the sum so deposited over to the shipowner.

Sect. 72 then provides that if the person making the deposit does within fifteen days give the warehouse owner such notice in writing, the warehouse owner shall apprise the shipowner of

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the notice and shall pay out of the sum deposited the sum, if any, admitted by the notice to be payable, and shall retain the remainder or balance, or, if no sum is admitted to be payable, the whole of the sum deposited, for thirty days from the date of the notice, "and at the expiration of such thirty days, unless legal proceedings have in the meantime been instituted by the shipowner against the owner of the goods to recover the said balance or sum or otherwise for the settlement of any disputes which may have arisen between them concerning such freight or charges as aforesaid, and notice in writing of such proceedings has been served on him, the wharf or warehouse owner shall pay the said balance or sum over to the owner of the goods, and shall by such payment be discharged from all liability in respect thereof."

Lindley L.J. was of opinion, and A. L. Smith L.J. shared his view, that the effect of sect. 72 was to give the shipowner the remedy against the consignee personally which he would have had if the consignee had taken delivery from the ship, and the shipowner had thereby abandoned his lien. Those learned judges thought that the language of the latter part of sect. 72 pointed to an action to recover the freight, and therefore, by implication, conferred a right to bring such an action against the consignee.

My Lords, I am, with all deference, quite unable to arrive at that conclusion. The section does not define the nature of the legal proceedings to be instituted by the shipowner, or limit them to an action for the freight. It is true that it mentions legal proceedings instituted against the owner of the goods to recover "the said balance or sum." But it is not disputed that an action might be maintained upon the contract of carriage against any person liable in respect of that contract. And the section proceeds, "or otherwise for the settlement of any disputes which may have arisen between them concerning such freight."

Lindley L.J. concedes (and I do not think there can be any doubt about it) that a suit might be maintained by the shipowner for the purpose of enforcing his security upon the sum deposited, and that in such proceedings any dispute as to whether the shipowner was entitled to the whole, or, if not, to

what part of the sum, might be determined. There seems to me, therefore, to be quite enough to satisfy all the words and objects of the section, without inferring that it confers a right to maintain an action founded on an implied contract under circumstances which render it unreasonable in my opinion to infer that any such contract was in fact entered into.

It was said by A. L. Smith L.J. that it was the duty of the consignee to be ready to take delivery of the cargo, and that it would be strange that a consignee by neglecting to be ready to receive the goods at the ship's side could compel the shipowner to resort to the warehousing clauses of the Act, and then, having made the deposit, and thus obtained possession of the goods, could force the shipowner to sue the shipper or owner of the goods for the freight wherever he might happen to be. I think there is a fallacy in this argument. A consignee in the position of the appellants is not bound as between him and the shipowner to be ready to take delivery of the goods. He is under no obligation to him at all. The shipper has no doubt undertaken that the consignee shall be so ready, and upon this contract he is, of course, liable; but the contract in no way affects the consignee. If liable at all, it is admitted that he becomes so only by reason of a new contract made by himself.

If the effect of the statute on the construction which I have indicated were to leave the shipowner with nothing but the liability arising from the contract of shipment, it might be strange that the Legislature should so materially have altered his position. But it is to be remembered that his lien can only be discharged, and the consignee can only obtain delivery, if the whole amount of his claim be in the hands of the dock company, to secure to him the entire sum to which he is entitled.

It is quite true that in some cases he might only obtain the sum due to him after a delay greater than would have been involved if he had not warehoused the goods, and that section of the Act had not come into operation. But the Act imposes upon him no obligation to warehouse them. It is merely an empowering enactment of which he need not take advantage. It may be that the enactment was not intended solely for the benefit of the shipowner, but had also in view the interests of

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the owners of the goods. But I see nothing in its provisions to justify what, as it seems to me, would be, not a construction of the Act, but the insertion in it of a distinct enactment, which I do not find there.

For these reasons I agree with the judgment of Davey L.J., whose opinion was in favour of the appellants.

But for the amendment of the statement of claim I should have thought that the proper course was to dismiss the action with costs, as at the outset the only claim was for freight, for which in my opinion the defendants were not liable. By the amendment, however, the respondents claimed a declaration that they were entitled to the whole of the 148*l.* 16*s.* 3*d.* The appellants did not oppose this claim, and stated they had never opposed it. This was not correct. Down to that time they had insisted on their right to retain 15*s.*, part of it. This right I think they abandoned by their answer to the amended statement of claim. I think the proper course is to declare that they are entitled to the sum of £148 16*s.* 3*d.* deposited with the dock company. Inasmuch as their claim in the first instance was only for the freight, I think the plaintiffs should not have any costs of the action. From the date of the defence to the amended statement of claim, inasmuch as the only question in controversy was that which your Lordships are prepared to determine against them, I think they should pay the defendants their costs. The defendants must also have their costs here and in the Courts below.

LORD WATSON :—

My Lords, the pecuniary interests involved in this appeal are of trifling amount, but the questions which it raises are of considerable importance to shipowners, and to that class of consignees who are not parties to any contract for the carriage of the goods consigned to them.

The facts of the case are simple enough, and are not the subjects of controversy. In the end of November 1892 a quantity of apples, consigned in separate parcels, by four different persons, was shipped on board the steamer *Inchulva*, which is owned by the respondents, for conveyance from Halifax,

Nova Scotia, to the port of London. The appellants were the consignees named in all the bills of lading, which were duly forwarded to them. It is not disputed that the consignments were made to them as agents for the consignors; that no property in the goods passed to them; and that, under the shipping documents, they incurred no personal liability for freight.

Each of the bills of lading contained a condition expressed in these terms: "The shipowners shall be entitled to land these goods upon the quays of the dock where the steamer discharges, immediately on her arrival, and upon the goods being so landed the shipowners' responsibility shall cease."

The *Inchulva* arrived in the Victoria Docks on Sunday the 11th of December 1892, and next morning was ready to unload. From some cause or other, the precise nature of which does not appear to be material, the appellants were not prepared to take immediate delivery ex the ship. The respondents did not act upon the permission given them by the clause just quoted to land the goods upon the quays of the dock, so that no question arises as to the construction and effect of that clause. They took advantage of the provisions contained in sect. 68 and subsequent clauses of the Merchant Shipping Act Amendment Act 1862; and, between 9 A.M. of Monday the 12th and noon of Tuesday the 13th of November, placed the whole of the goods in a warehouse of the London and India Docks Joint Committee. On the 10th of December they gave a written notice to the docks committee not to part with the goods until freight was paid, but did not specify the amount of the freight which they claimed.

On the 12th of December the appellants deposited in the hands of the docks committee the sum of £152 17*s.* 1*d.*, which was the total amount of freight payable according to the bills of lading, upon the assumption that the whole cargo had been safely carried. It proved to be in excess of the freight claimed by the respondents, which was £148 16*s.* 3*d.* The appellants admitted £148 1*s.* 3*d.* to be justly due, but disputed the balance of 15*s.*, and they accordingly directed the warehousemen to tender the freight, so far as admitted, to the respondents, and

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to retain the balance of the deposited money. The warehousemen, in respect of the deposit, delivered the goods to the appellants. The respondents declined to accept payment from the warehousemen of any sum short of the full amount of freight which they claimed. A correspondence ensued in which the parties took up these hostile positions. The respondents insisted that they were entitled to receive immediate payment of their full claim, leaving the appellants to recover any overpayment which they might be able to instruct. The appellants maintained that in so far as they were concerned the respondents had no pecuniary claim except against the deposited fund; that they were only entitled to immediate payment of freight in so far as admitted; and that they were not entitled to payment of disputed freight out of the fund until they duly established their right to it.

The respondents then brought the present action, in which they claimed a personal decree against the appellants for the full amount of freight which they alleged to be due. The statement of claim is couched in very general terms, but these appear to me to import, and I have no doubt were meant to convey the assertion, that the appellants had incurred a personal obligation to pay freight, which was not satisfied by their depositing the amount of freight claimed with the warehousemen. The defence is confined to a denial of liability. In the course of the action the sum deposited was brought into Court by the docks committee.

Before the case went to trial, the respondents amended their pleadings by adding a new and alternative claim for a declaration "that they were entitled to a lien upon the above-mentioned goods for the said freight, and are now entitled to a lien upon and to the sum of £148 16*s.* 3*d.*, part of a sum of £152 17*s.* 1*d.* paid by the defendants to or deposited with the London and India Docks Joint Committee in respect of the said freight." In their amended defence the appellants stated, with reference to the alternative, "that they have no interest in the claim put forward, and they have never resisted such a claim."

The answer thus made by the appellants does not appear to me to be altogether accurate. They had all along admitted

that the respondents had a lien on the deposited money for whatever freight they could establish to be justly due. But they had persistently denied that the respondents had a good lien for more than £148 1*s.* 3*d.* Their answer for the first time conceded that the respondents had a valid lien for the full freight claimed. That admission put it within the power of the respondents to end the litigation. The deposited money was in Court. Had the judge been moved to grant the declaration, which was not opposed, it would necessarily have been followed by an order to pay to the respondents, out of that money, the full amount of their claim.

The respondents elected to proceed with the litigation; and it is obvious that their object was to establish that, in addition to their admitted right to enforce their lien over the money deposited, they had an independent personal claim against the appellants, which they could enforce by action. Day J. sustained their claim, and gave them a personal decree against the appellants. His decision was affirmed by a majority of the Appeal Court, consisting of Lindley and A. L. Smith L.JJ., Davey L.J. (now Lord Davey) dissenting.

Before adverting to the provisions of the Act of 1862, it may be useful to consider what, previous to its passing, were the mutual rights arising to parties in the same position as these litigants. The law upon that point does not appear to me to admit of doubt. The holder of the bills, although he was no party to the contract of carriage, and had no property in the goods, had yet a good title to demand delivery; but he could not insist on that demand unless he was prepared, as a condition of obtaining delivery, to satisfy the shipowner's claim for freight. On the other hand, if delivery was not taken on these terms, or, if he delivered the goods without being paid freight, the shipowner could not sue a holder of the bills who was not liable upon the contract of carriage, unless he could shew that such holder had incurred an independent obligation to pay freight. The existence of such an obligation was not matter of legal implication. It required to be proved as matter of fact. In cases where the goods had been delivered it was frequently held to be matter of reasonable inference that delivery had been

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given and received, on the mutual understanding that the recipient was to pay the freight in consideration of the surrender of his lien by the shipowner.

Sect. 70 of the Act provides that when goods have been landed and warehoused, with notice of the shipowner's lien, in terms of sects. 67 and 68, upon deposit of the amount of freight claimed with the warehouseman, "the lien shall be discharged, but without prejudice to any other remedy which the shipowner may have for the recovery of the freight." The effect of that enactment is that, whenever the deposit is duly made, the shipowner's lien is transferred from the goods to the money deposited, and the warehouseman becomes bound to deliver the goods to the depositor.

Sects. 71 and 72 prescribe the course which is to be followed in the event of the shipowner electing to take his remedy against the money, which is thus made subject to his lien. If the depositor does not, within fifteen days after making the deposit, give notice in writing to the warehouseman to retain it, the money becomes payable to the shipowner. If notice is given within the time limited, the warehouseman must forthwith apprise the shipowner of such notice, and pay or tender to him the sum admitted to be due, retaining the balance of the deposited money for thirty days from the date of the notice. On the expiry of that period the balance retained is to be repaid to the depositor, "unless legal proceedings have in the meantime been instituted by the shipowner against the owner of the goods to recover the said balance or sum, or otherwise for the settlement of any disputes which may have arisen between them concerning such freight or other charges as aforesaid."

These enactments plainly contemplate that the shipowner may enforce his statutory lien by an action for ascertainment of the amount of freight justly due to him, and for payment of that amount out of the deposited money. They reserved to the shipowner all remedies which he had for recovery of freight, other than through his lien upon the goods, at the time when such lien is extinguished, in terms of sect. 70.

In the present case there does not appear to me to be any evidence which can raise an inference in fact that the appellants

promised to pay freight to the respondents. The only object which the appellants had in view was to obtain lawful possession of the goods, and that object was fully attained by their compliance with the statutory condition, which at once terminated the respondents' lien on the goods and gave them right to claim delivery from the docks joint committee. To my mind, it is in the last degree improbable that the appellants should have undertaken a personal liability, which was unnecessary for their purpose, and would have been wholly gratuitous.

It was maintained, in the course of the argument for the respondents, that the provisions with reference to "legal proceedings," which I have already quoted, and which are to be found towards the end of sect. 72, confer upon them the right to make a personal claim against the appellants. I do not think these provisions are capable of being so interpreted. They do not profess to give any new remedy; they simply direct that, in a certain event, the warehouseman shall retain the sum or the balance of the sum deposited with him until the shipowner has established the amount of the freight to which he is entitled, by means of a decree obtained in any proceedings which he may have a good title to raise and insist on.

For these reasons I am of opinion that the present action, as originally laid, entirely fails, and that the order appealed from must be reversed. I concur in the judgment which has been proposed by the Lord Chancellor.

LORD MACNAGHTEN:—

My Lords, I agree.

The first question to be considered seems to be this: Apart from the Merchant Shipping Act 1862, had the respondents as against the appellants any remedy for the recovery of their freight other than a lien upon the goods by the carriage of which the freight was earned?

The appellants, it must be remembered, were not parties to the contract of affreightment. Nor were they liable for the freight under the Bills of Lading Act 1855, being only agents for sale to whom the property in the goods did not pass. No doubt if they

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had received the goods from the ship one would have inferred a contract on their part to pay the freight in consideration of the shipowner giving up his lien. That would have been only reasonable. The master could not be asked to forego his lien without getting an equivalent. It would involve a breach of duty to his employer. The only possible equivalent short of actual payment would be a binding promise to pay. But the goods in the present case were not received by the appellants from the ship. What occurred was this: the master, availing himself of the power given to him by the Act of 1862, landed the goods and placed them in the custody of the London and India Docks Joint Committee subject to a stop for freight. Until the owner of the goods deposited with the docks committee a sum equal to the amount claimed for freight the docks committee held the goods for the shipowner to protect his lien. As soon as the deposit was made the lien was discharged by virtue of the enactment. The only obstacle to the delivery of the goods was then removed, and the appellants at once became entitled to possession. It is difficult to see how a contract on the part of the appellants to pay freight can be inferred either from the delivery of the goods by the shipowner to persons who received them as his agents—whose possession for the time was his possession—or from the circumstance that those persons after they had ceased to be his agents delivered the goods to the appellants who had at that time a perfect and unqualified title to immediate possession.

If it be that, independently of the Act of 1862, the respondents as against the appellants had no remedy for recovery of their freight other than their lien, there comes the question: Does the Act give a personal remedy for the recovery of the freight against the owner of the goods when he receives them from the wharf or warehouse owner?

The respondents maintain that the Act does give such a remedy, and they rely (as Lindley L.J. relied) on sects. 70 and 72.

Sect. 70 certainly does not give the shipowner a new remedy against the owner of the goods. It does not purport to do

anything of the kind. It merely declares that the discharge of the lien is to be without prejudice to any other remedy which the shipowner may have for the recovery of the freight. He may have another remedy against the owner of the goods, or he may not.

Although the rights given to the shipowner in lieu of and in substitution for his lien are not completely worked out in sect. 72, the meaning is perfectly clear. The sum deposited, which must in every case be the full amount claimed by the shipowner, is to be made available, and made available, if necessary, by process of law, for the purpose of satisfying the shipowner's claim so far as his claim is admitted or may be established by legal proceedings. "The said balance or sum," which is spoken of in sect. 72 as the subject-matter of the legal proceedings there referred to, is, I think, the specific sum on deposit with the wharf or warehouse owner, or (as the case may be) the balance of that sum remaining in the hands of the wharf or warehouse owner after payment of so much as is admitted by the owner of the goods to be due to the shipowner. So far there is nothing, I think, to suggest the creation of a personal liability on the part of the owner of the goods. Nor do I think that the words which follow, "or otherwise for the settlement of any disputes between them concerning such freight," necessarily or naturally imply that the shipowner was to have a claim against the owner of the goods personally in all cases or in any case in which he would not have such claim independently of the Act of 1862.

It is, I think, a mistake to suppose that this part of the Act was passed simply for the benefit of the shipowner, and so to approach its construction from that point of view only. This part of the Act was passed, I should suppose, for the convenience of commerce, and in order to facilitate the despatch of business. Possibly it may be used unreasonably or even oppressively by persons who are more bent on giving trouble to others than doing their own business in a business-like way, if such persons there be. But that is hardly a reason for doing violence to language tolerably plain, or for importing into the enactment provisions which are not obvious if it be construed fairly and without any leaning to one side or the other.

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I think the view of Davey L.J. was correct, and I concur in the motion which has been proposed.

Order of the Court of Appeal and judgment of Day J. reversed, with a declaration that the respondents are entitled to the sum of £148 16*s.* 3*d. deposited with the docks joint committee: the respondents to recover no costs in the action and to pay the appellants' costs below from the date of their answer to the amended statement of claim, and their costs in this House: cause remitted to the Queen's Bench Division.*

Lords' Journals 17th December 1894.

Solicitors for appellants: *Devereux & Heiron.*
Solicitors for respondents: *Wm. A. Crump & Son.*

[HOUSE OF LORDS.]

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NORTH WESTERN BANK, LIMITED . APPELLANTS;

AND

JOHN POYNTER, SON, & MACDONALDS . RESPONDENTS.

Ship—Bill of Lading—Pledge—Redelivery of Goods to Pledgor in Trust for Sale—Transaction in England—Validity of Arrestment of Funds in Scotland—Conflict of Laws.

In the law of Scotland, as in the law of England, a pledgee may redeliver the goods to the pledgor for a limited purpose without thereby losing his rights under the contract of pledge.

The pledgors of a bill of lading representing a specific cargo were under contract to sell a larger quantity of like goods to third parties. The pledgees returned the bill of lading to the pledgors to obtain delivery of the merchandise and sell on the pledgees' behalf, and account for the proceeds towards satisfaction of the debt:—

Held, that the pledgees' security was not affected, and they were entitled to the proceeds of the cargo as against the diligence of general creditors of the pledgors.

A question between domiciled English parties as to the title to a

moveable fund situated in Scotland is generally a question of English law.

Tod & Son v. *Merchant Banking Company* (10 Court Sess. Cas. 4th Series (Rettie), 1009) distinguished.

APPEAL from a decision of the Second Division of the Court of Session, Scotland (1), in an action of multiplepoinding originating in the Sheriff Court of Lanarkshire to determine the right to a fund, amounting to £1039 7*s.* 5*d.*, held by A. Cross & Sons, Glasgow, which was claimed by the North Western Bank, Liverpool, the appellants, and also by Poynter, Son, & Macdonalds, the respondents.

The appellants are bankers at Liverpool, and C. Page & Co. were merchants at the same place. On the 1st of April, 1892, C. Page & Co. asked the appellants whether they were willing to advance £5000 upon security by way of pledge of 1629 tons of phosphate rock then afloat on board the *Cyprus*, besides another cargo as to which no question was made in this action, and of which the proceeds (£3826 9*s.* 1*d.*) had been paid to the appellants to the credit of the loan of £5000. The appellants expressed their willingness to do so, and the bills of lading, indorsed in blank, were handed to the appellants.

On the 4th of April, 1892, the appellants wrote to C. Page & Co.:—

"Advance No. 7, Phosphate.

"We now beg to put in writing the conditions on which we advance to you the sum of £5000, repayable by you on or before the 1st June, on the security of the under-mentioned merchandise which you pledge to us and warehouse in our name.

"It is distinctly agreed that we are to have immediate and absolute power of sale, and under that power we authorise and empower you to enter into contracts for the sale of the merchandise on our behalf in the ordinary course of business, and we expressly direct you to pay to us from time to time the proceeds of all such sales immediately and specifically as received by you to be applied towards payment of the said advance, interest, commission, and all charges.

"You are at any time at our request to give us full authority

(1) 21 Court Sess. Cas. 4th Series (Rettie), 513.

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to receive all sums due or to become due from any person or persons in respect of any sales of the merchandise so made by you on our behalf. You are to insure the merchandise against all fire risks on our behalf, and you undertake to keep it fully covered, to hold the policy in trust on our account, and in case of loss to collect and pay the insurance money to us in the same manner as proceeds of sale.

"Particulars of merchandise.

"1629 Phosphate Rock *Cyprus* B/L held by us.

"1826 „ *Storra Lee* „ delivered to you."

C. Page & Co. on the same date acknowledged this letter as correctly setting out the conditions, and they undertook to carry out the appellants' directions.

On the 12th of April, 1892, the appellants handed the *Cyprus* bill of lading to C. Page & Co. with the following letter:—

"In consideration of your undertaking to deal with the merchandise in the manner hereinafter specified, we transfer to you as trustees for us the bill of lading, &c., for 1629 tons phosphate rock per *Cyprus*, marked which we now hold as security for payment of the advance specified at foot, and we request you to obtain delivery on our account of the merchandise referred to in such bill of lading and warehouse the same in our name, you paying the freight and expenses of discharge. We further authorise and empower you to enter into contracts for the sale of the merchandise on our behalf, in the ordinary course of business, and we expressly direct you to pay the proceeds of all such sales from time to time to us immediately on receipt thereof in order to be applied towards retirement of such advance. You are at any time at our request to give us full authority to receive all sums due or to become due from any person or persons in respect of any sales of the merchandise so made by you on our behalf.

"You are to insure the merchandise," &c.

C. Page & Co. acknowledged this letter and the receipt of the bill of lading, and delivered on the same date to the appellants the following sale-note signed by them:—

"We have sold for you 1629 tons phosphate rock, ex *Cyprus*, in your name, and held by you by way of pledge for phosphate

advance No. 7, for £5000, and for which b/lading has been handed to us for the purpose of enabling us to complete the sale which we have contracted for on your behalf with Messrs. A. Cross & Sons, Glasgow; and in consideration thereof we hereby undertake to pay to you the proceeds of said sale, payment expected about 5th May, immediately and specifically as received, in accordance with the directions contained in your letter of April 4th."

The next letter was from C. Page & Co. to Poynter, Son, & Macdonalds, Glasgow:—

"We beg to enclose you bill of lading for the cargo of the phosphate, per *Cyprus*, which please hand to Cross on arrival of the vessel."

In September, 1891, C. Page & Co. had entered into an agreement to sell to A. Cross & Sons, Glasgow, several hundred tons of phosphate rock, which was to be shipped between certain dates, and when the bill of lading of the *Cyprus* was handed to C. Page & Co. they transmitted it to A. Cross & Sons in implement of their contract with them. The bill of lading was forwarded through the respondents, to whom C. Page & Co. were heavily indebted. As stated above, £3826 was received by the bank as the proceeds of another cargo. A. Page & Co. had also received a cheque for £1900, as part of the price of the *Cyprus* cargo; but instead of paying that £1900 into the bank upon the account of this No. 7 advance, when they paid it in upon the 20th of April, 1892, they paid it in respect of another advance called No. 4 advance, it being alleged that the appellants were not aware at the time that this money was part of the proceeds of the *Cyprus* cargo. There remained of the proceeds of the *Cyprus* cargo in the hands of A. Cross & Sons a balance amounting to £1039 7*s.* 5*d.*, which was the fund now in question.

On the 3rd of May, 1892, the respondents arrested in the hands of A. Cross & Sons all sums lying in their hands belonging to C. Page & Co., the respondents being creditors of C. Page & Co., who had stopped payment. The appellants on the same day but after the arrestment intimated to A. Cross & Sons that the 1629 tons phosphate rock, ex *Cyprus*, was their

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property, and was sold by C. Page & Co. on their behalf, and requested payment of the balance due.

On the 18th of April, 1893, the Sheriff-Substitute of Lanarkshire (Guthrie) pronounced an interlocutor, finding the respondents entitled to the fund in question.

By interlocutor, dated the 2nd and signed the 20th of February, 1894, the Second Division, Lord Justice Clerk (Macdonald) and Lord Trayner—Lord Young dissenting—pronounced the following interlocutor :—

"Find in fact (1.) that by sale-notes, dated 23rd September and 19th November, 1891, Charles Page and Company, Liverpool, sold to Alexander Cross and Sons, Glasgow, a cargo of phosphate rock on the terms therein mentioned; (2.) that the said cargo, or part thereof, was shipped on board the SS. *Cyprus*, and that a bill of lading was granted by the master of said steamer therefor to, and that the same was held by, the said Charles Page and Company; (3.) that on 1st April, 1892, Charles Page and Company applied for an advance of £5000 from the North Western Bank, Limited, on the security, by way of pledge, of inter alia the cargo per the *Cyprus*, and that on 4th April the said bank agreed to give and did give the advance asked, on the terms contained in the letter No. 12/3 of process; (4.) that the said Charles Page and Company delivered said bill of lading to the North Western Bank, Limited, blank endorsed, and thereby pledged the said cargo to the said bank; (5.) that on 12th April, 1892, the said bank redelivered the said bill of lading to Charles Page and Company, without any endorsation by the bank, by the letter No. 13/5 of process, and that on same date Charles Page and Company forwarded the said bill of lading to the claimants John Poynter, Son, and Macdonalds, for delivery to the buyers Alexander Cross and Sons on arrival of the *Cyprus*; (6.) that the said Alexander Cross and Sons duly received said bill of lading and took delivery of said cargo, and made payments to account thereof, and that the balance of the price due by them amounted as at 3rd May, 1892, to £1039 7*s.* 5*d.*, being the fund in medio; (7.) that on 3rd May, 1892, the said sum of £1039 7*s.* 5*d.* was validly arrested in the hands of the said Alexander Cross and Sons by the claimants John Poynter, Son, and Macdonalds, who

were lawful creditors of the said Charles Page and Company to the amount of £2011 16*s.*, with interest and expenses, conform to decree in their favour No. 13/2 of process; and (8.) that at the date of said arrestment John Poynter, Son, and Macdonalds were ignorant of the transaction between Page and Company and the bank above mentioned: Find in law that, at the date of said arrestment, the said sum of £1039 7*s.* 5*d.* was a debt due by Alexander Cross & Sons to the said Charles Page and Company, and was therefore liable to the diligence of the lawful creditors of the latter, and that the claimants, the North Western Bank, Limited, by redelivery of said bill of lading on said 12th April, 1892, lost their right (of preference) as pledgees of said cargo, and had no preferable right of property therein entitling them to payment of said sum as in competition with the arresting creditors, the said John Poynter, Son, and Macdonalds, Therefore dismiss the appeal, and affirm the interlocutor appealed against," &c. (1)

On appeal,

1894. Nov. 15, 16. *Finlay*, Q.C., and *L. Sanderson* (with them *H. Aitken*, of the Scottish Bar), for the appellants:—

The decision of the Court of Session was erroneous. The transaction between Page & Co. and the appellants was in England. Page & Co. and the appellants both resided in England, and the question being one as to the appellants' security, and what was the nature of the contract, it must be governed solely by English law.

According to the law of England the arrested money could not be held to be part of the estate of the pledgors, Page & Co. There is no doubt that if these goods were sent to Scotland, and there was a transaction in that country in which the pledgors held themselves out as real owners, there might be a question of Scots law overriding English law; but that is not the case here.

The question is, did Page & Co. agree to carry out the sale as the agents and on behalf of the appellants? The correspondence

(1) 21 Court Sess. Cas. 4th Series, (Rettie), 513.

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shews this was the intention, and the intention must prevail: *Sewell* v. *Burdick* (1). In *Reeves* v. *Capper* (2) a chronometer was pledged by the owner, the captain of the ship: "In consideration of your advancing £100 instead of £50, I hereby make over to you as your property, until that sum be repaid, my chronometer, you allowing me the use for this voyage"; and it was held that the possession of the captain was still the possession of the lender.

The Court of Session held that by Scots law the pledgees, the appellants, having given up the subject of the pledge to the pledgor, must be taken to have put an end to the transaction of pledge between the parties. If Scots law is to govern this case that law was not correctly stated by the Court of Session. The sum arrested belonged to Page & Co. only as trustees for the appellants; and in Scotland trust money cannot be arrested to found jurisdiction. With regard to *Tod & Son* v. *Merchant Banking Co.* (3) the facts there were different in many respects, and there was no evidence of any intention that the goods should be sold on behalf of the bank; nor does the passage quoted from Bell's Comm. 7th ed. vol. 2, p. 22, apply. Secondly, there was a cheque for £1900 transmitted to the appellants, and not paid in to the credit of the £5000 advance No. 7, but to another—advance account No. 4. The respondents contend that the appellants have been paid if this cheque is taken into account. But Page & Co. paid in this cheque with directions to apply the amount to the other advance, No. 4, and the appellants, not knowing it was proceeds of the cargo and not being bound to pay it in to No. 7 account, simply credited it as directed. Even if the appellants had known it to be part of the proceeds, the matter was solely between the appellants and Page & Co., and an arrangement between them to pay the sum to No. 4 account could not make any difference in the rights of the parties in these proceedings.

Sir *R. Webster*, Q.C., and *D. C. Leck*, for the respondents:—

First, the question to whom this fund belongs must be decided

(1) 10 App. Cas. 74.
(2) 5 Bing. N. C. 136.
(3) 10 Court Sess. Cas. 4th Series (Rettie), 1009.

by Scots law. Secondly, there was in fact no sale by an agent of the appellants. Having regard to the true facts of the case, the appellants cannot be placed in a better position than that of assignees of the proceeds of the goods, and by Scots law, until that claim to the proceeds was intimated to Cross & Sons, this right of the appellants did not attach in a question with an arrester of the fund. Cross & Sons owed the money to Page & Co., not to the appellants. And although the appellants might be able to sue Cross & Sons for goods sold and delivered, Cross & Sons could not sue the appellants on any claim for damages on the ground that the goods supplied were inferior to the contract. A pledge depends on possession, and upon giving the pledge into the hands of the pledgor, that he may deal with it as his own, the pledgee's title ceases. The Scots law recognises possession as proof of the title to the goods. If the appellants can claim a special benefit from English law, then English law ought to have been proved in the Court of Session; and what was said in *Cooper* v. *Cooper* (1) as to this House being competent to decide English law without proof in a Scots appeal does not apply to a case from the Sheriff Court. *Tod & Son* v. *Merchant Banking Co.* (2) is most applicable to this case. Besides, the two first findings shew that the sale to Cross & Sons had been completed prior to the 12th of April, and that the appropriation had taken place before any arrangement with the appellants had been made. Thirdly, the appellants have been paid the whole advance they made. At all events, there is no conclusive finding in the judgment appealed from on this point, and the respondents ask for a remit to decide this question. They are entitled to this, for this being a case originating in the Sheriff Court, if any fact material to the issue between the parties is not found by the Court of Session, there is no recourse open to this House but to send the case back: see Judicature Act of Scotland, 1825 (6 Geo. 4, c. 120), s. 40, and *Mackay* v. *Dick* (3).

Fourthly, if the appellants are found entitled to these proceeds they are not entitled to the proceeds without deduction of the

(1) 13 App. Cas. 88. (2) 10 Court Sess. Cas. 4th Series (Rettie), 1009.
(3) 6 App. Cas. 251.

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costs—£164 19*s.* 2*d.*—of the sale, for they are only entitled to the net proceeds. Therefore, the arrestment was good so far.

No reply was required.

LORD HERSCHELL L.C.:—

This action was tried in the Sheriff Court of Lanarkshire, and an interlocutor was pronounced in favour of the present respondents in that court. This interlocutor was affirmed in the Court of Session by the Lord Justice Clerk and Lord Trayner, Lord Young dissenting. The proceedings arose out of the arrestment by the present respondents of a debt due or alleged to be due from Alexander Cross & Co. to the firm of Charles Page & Co. The respondents were undoubtedly creditors of Page & Co.; and if that debt, which certainly was due by Cross & Co., was a debt due to Page & Co., and was the property of Page & Co., then clearly the arrest was good, and there would be no ground for this appeal. The appellants, however, contend that the debt which Cross & Co. owed was the price of a cargo sold to them, that the cargo was sold to them by Page & Co. as the agents of the appellants, the North Western Bank, and that therefore the debt was really the property of the North Western Bank, and consequently could not be arrested by a creditor of Page & Co. I do not understand it to be disputed that if in fact the goods sold were the property of the North Western Bank, then, although the sale may have been made by Page & Co. to Cross & Co., yet being made by Page & Co. on behalf of the bank as owners, it could not be attached by a creditor of Page & Co.; and certainly there is no decision or indication of any opinion to the contrary in the Court below.

The transaction between Page & Co. and the North Western Bank upon which the appellants rely took place in the month of April, 1892, the arrest being on the 3rd of May, 1892. Certain goods for which Page & Co. held a bill of lading were on their way to this country, and they desired upon this bill of lading to obtain an advance. On the 4th of April, 1892, a letter was written by the manager of the bank (which was admitted by a subsequent letter of Page & Co. to detail correctly the conditions

on which the advance was made), in which the terms on which the bank were willing to make the advance were stated. The letter was as follows: "Dear Sirs,—We now beg to put in writing the conditions on which we advance to you the sum of £5000, say five thousand pounds, repayable by you on or before 1st June, on the security of the under-mentioned merchandise, which you pledge to us and warehouse in our name. It is distinctly agreed that we are to have immediate and absolute power of sale, and under that power we authorise and empower you to enter into contracts for the sale of the merchandise on our behalf in the ordinary course of business, and we expressly direct you to pay to us from time to time the proceeds of all such sales immediately and specifically as received by you, to be applied towards payment of the said advance, interest, commission, and all charges. You are at any time at our request to give to us full authority to receive all sums due or to become due from any person or persons in respect of any sales of the merchandise so made by you on our behalf. You are to insure the merchandise against all fire risks." At the end of the letter there is a statement of the particulars of the merchandise—1629 tons of phosphate rock by the ship *Cyprus*, and 1826 tons of phosphate rock by the ship *Storra Lee*. On the occasion when that letter was written and the arrangement entered into the bill of lading for the phosphate rock per the *Cyprus* was handed, indorsed in blank, by Messrs. Page & Co. to the bank.

On the 12th of April the bank handed the bill of lading to Messrs. Page & Co., with a letter in these terms: "In consideration of your undertaking to deal with the merchandise in the manner hereinafter specified, we transfer to you as trustees for us the bill of lading, &c., for 1629 tons phosphate rock, per *Cyprus*, marked , which we now hold as security for payment of the advance specified at foot, and we request you to obtain delivery on our account of the merchandise referred to in such bill of lading and warehouse the same in our name, you paying the freight and expenses of discharge. We further authorise and empower you to enter into contracts for the sale of the merchandise on our behalf in the ordinary course of business, and we expressly direct you to pay the proceeds of all such sales

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from time to time to us immediately on receipt thereof." That letter was received and acknowledged, and an undertaking was signed by Page & Co. to carry out the directions given in the letter.

The transaction between the parties which gives rise to the controversy was thereupon complete. The bill of lading so received by Page & Co. was afterwards delivered by them, in implement of a contract of sale, to Cross & Co., and it is with respect to the price of the goods comprised in the bill of lading that the debt of Messrs. Cross arises.

Now, I cannot help saying at the outset that, in my opinion, it is abundantly clear that the rights of Messrs. Page & Co. and the bank respectively must be determined, if the strictly legal course is to be followed, by the law of England. A transaction between a merchant in England and a bank in England, and the rights which arise out of that transaction, cannot, as it seems to me, fall to be determined by anything but the law of England; just in the same way as, if this had been a transaction between a banker and a merchant in Glasgow, and a question had arisen in an English proceeding as to the rights that arose out of that transaction, it would have fallen to be determined according to the law of Scotland. But in the present case it appears that there being a suggestion in the pleadings that the matter was one to be determined by the law of England, when the case came on for trial before the sheriff those who maintained that proposition were not desirous of leading evidence to shew what the law of England was. They were content to rest their case upon the law of Scotland, and have it decided as if the law of Scotland were applicable; or perhaps one may put it otherwise and say, as if there were no difference between the law of England and the law of Scotland. That being so, I enter into no controversy whether it would have been open, in the present case, to this House to consider what the law of England was, and to determine the case according to that law. I am content to base my decision upon the conclusion at which I have arrived as to the law of Scotland.

Of course, when I say that the rights arising out of this transaction between these parties would fall to be determined

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by the law of England, I do not for a moment intend to dispute that, where such a transaction has been entered into, there may be proceedings or transactions in Scotland which would render a recourse to the law of Scotland necessary to ascertain the rights which had arisen in respect of transactions relating to the contract though it had its basis and origin in England. Those are considerations quite beside the present case; because it seems to me that, in the present case, there is really nothing which needs to be determined for the purpose of arriving at a conclusion in this action, except what was the real nature of the transaction at Liverpool between Messrs. Page & Co. and the North Western Bank.

It appears that in the month of September of the previous year Messrs. Page & Co. had entered into an agreement to sell to Messrs. Cross & Co. several hundred tons of phosphate which were to be shipped between certain dates. It was not a sale of any specific goods; it was merely a contract to sell goods of a particular quality and quantity to be shipped at a particular time. When the bill of lading was handed to Messrs. Page & Co. on the 12th of April, 1892, Messrs. Page & Co. transmitted that bill of lading to Messrs. Cross & Co. in implement of their contract with them. Upon their thus receiving the bill of lading in implement of the contract, that which down to that time had been only an agreement to sell became a sale, and Messrs. Cross became liable for the price of the goods so sold. Now, was that or was it not a sale of the bank's goods? Was it a sale for or on behalf of the bank, or was it a sale of Page's goods in respect of which the bank could not claim to be principals? My Lords, the only ground upon which the Courts below have decided that it was a sale, not of the bank's goods, but of Page's goods, is this, that in order that a pledge may be effectual possession must continue in the pledgee—that parting with the possession is parting with his security and with any property which the pledge gives, and that even if the possession of the pledge may be parted with to a stranger, so that the possession of the stranger should be still the possession of the pledgee, possession cannot be so parted with to the pledgor himself; and that if the pledgor receive back possession of the

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goods pledged, however clear it may be that he was to receive them only as the agent of the pledgee to do something with them on the pledgee's behalf,—that they were delivered for that purpose and received for that purpose,—the law of Scotland inexorably requires that it shall be held that the pledge is at an end, and that the entire property has reverted to the pledgor because he has regained possession of the goods which he had pledged. My Lords, I need hardly say that if the law of England were applied no such point would be arguable for a moment. There can be no doubt the pledgee might hand back to the pledgor as his agent for the purpose of sale, as was done in this case, the goods he had pledged, without in the slightest degree diminishing the full force and effect of his security. But it is said that the law of Scotland is different; and the point upon which this case must turn cannot be more distinctly put than it was put in the judgment of Lord Trayner. He says: "That a pledgee may part with the pledge temporarily for a necessary purpose, or for safe custody without the loss of this right, may be admitted, provided he has not so parted with it to the owner. If he parts with it to a third party, the temporary possession of the latter is possession for the pledgee: he has no right in or to the subject except that which the pledgee gave him, and which the pledgee may at any time take away. But if the pledgee parts with the pledge to the owner the result is that the owner resumes possession of his own property freed from the security burden; the owner acquires no new right; but the pledgee's right, as a real right, flies off, leaving him only his personal right against his debtor. This distinction between the delivery of the subject of pledge to a third party and to the owner is recognised in the passage in Bell's Commentaries which I have already cited."

Now, the question is whether that can be maintained as a proposition of the law of Scotland. Certainly there are cases where some rule of law defeats the object and intention of the parties—where there is a technical rule which prevents effect being given to their intention. The question is whether such a rule applicable to the present case has been shewn to be established as part of the law of Scotland or not. I turn to the authorities upon which it is rested, because I confess that, with all respect,

as a matter of principle I am unable to see why any such rule should exist. It does not seem to me to be a reasonable rule. If the rule exists, it is one which runs counter to every-day commercial practice and, I am satisfied, to every-day commercial understanding of business transactions. Nevertheless, it may be that it is an established rule.

Now, the only authorities cited are three. The first is in Erskine's Institutes, 3. 1. 33, where it is said: "In a pledge of moveables the creditor who quits the possession of the subject loses the real right he had upon it." Well, as a general proposition that may be perfectly true. It is to be observed that in the present case this is really something more than a pledge. In the paragraph from which I have quoted those words it is pointed out that a pledge gives only a right of detention of the goods, and gives no right to sell. Where, as in the present case, the delivery of the goods is accompanied by a grant of an absolute right of sale to the pledgee, he is certainly something more than an ordinary pledgee; he has a right which a mere pledge does not convey. But the general proposition that the parting with possession puts an end to the pledge is one with which I suppose no one would quarrel; but it does not touch the question with which your Lordships have to deal—namely, whether a delivery of possession for a particular purpose on the part of the pledgee to the pledgor is a parting with possession any more than a delivery under the same circumstances and for the same purpose to a third person.

The next authority referred to is in Bell's Commentaries on the Law of Scotland. He there alludes to the real right of a creditor being completed by delivery and continued by possession, which I suppose no one would doubt; and then occurs this discussion: "By the Roman law, it was lawful for the creditor, after the constitution of pledge by delivery, to restore the subject to the possession of the debtor on the footing of location, or any other legitimate contract. Paulus lays down this doctrine very explicitly. But Voet very justly observes, in criticising this law, that to permit such practices were to endanger the safety of other creditors, and to sanction a fraud upon the rule which requires possession to complete a real right to moveables;

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and that no true analogy can hold between the law of Rome, where hypothecs without possession were admitted, and the laws of modern commercial nations, in which the rule is established that possession presumes property." Then he continues thus: "It is true that, in the course of many contracts, there is a necessity for separating property and possession, and that the mere circumstance of goods being in the hands of another on a temporary contract will not deprive the real proprietor of his right in favour of the creditors of the temporary possessor." Now that is stated generally; there is no exception made in the case of the person in whose hands the pledged goods are placed being himself the pledgor. Then he proceeds: "And there seems to be no doubt that the right of a pledgee will also be sufficiently strong to support this temporary dereliction of possession, in the course of necessary operations on it; the manufacturer or other holder being custodier for the pledgee, without injury to the real security. But the doctrine delivered by Voet is sound, where the possession is given up without necessity to the owner of the goods." That is confined to a case of possession being given up, without necessity, to the owner of the goods, and does not, and, as it seems to me, never was intended to, cover the case where possession is given to the person who happens to be the pledgor, just for the same legitimate purpose and in the same business manner as it might be given to any third person filling the same commercial capacity—that is to say, if it is given to a broker for sale or to a warehouseman to warehouse, or in other cases which might be put. There is nothing in that passage to warrant the conclusion that where the parties intended that to be, and it really was, the nature of the transaction, nevertheless their intention shall be held to be ineffectual because against their will the pledge or security is thereby destroyed. My Lords, where it is a pledge, as here, with a power of sale, I cannot think that anything I have yet read warrants the assertion that the delivery to the pledgor, who is a broker, for the purposes of sale would destroy all the rights of the pledgee.

Now, beyond those general statements, which do not seem to me necessarily to cover or to touch this case, there is only one

authority cited, and that is the case of *Tod & Son* v. *Merchant Banking Company* (1). Of course that case would be open to review in your Lordships' House; but I confess, with all deference to the learned judges in the Court below who took that view, I am unable to see that it governs the present case, or that it necessarily leads to the conclusion which the respondents seek to induce your Lordships to arrive at in the present case. The whole judgment here is based upon the proposition that delivery by the pledgee to the pledgor puts an end to the pledge. In the case of *Tod & Son* v. *Merchant Banking Company* (1) the bank, who were the pledgees, never did deliver the goods at any time to any person to hold for them as their agent. The only deliveries which they ever made in that case were deliveries to a purchaser, who received the goods, not for the bank, but to hold from the moment of receipt as owner under the purchase. I confess I am at a loss to see how a case which deals with facts such as I have described can be held to be an authority for the proposition that the delivery of goods by a pledgee to a pledgor as his agent puts an end to the pledge. In that case the bank were pledgees without any power to sell at all—they were mere pledgees. Messrs. Bryant & Ridley, who had pledged the goods, came to the bank, and obtained from the bank a promise that if they sold the goods, and would obtain from the purchaser an obligation to pay the price to the bank, the bank would then deliver the goods to him. In the first instance, before the bank ever parted with the goods they did obtain a direct undertaking from the purchaser of a portion of these pledged goods to pay the price to them, and then they gave the order for the delivery of them to the purchaser. In the second case, which was the transaction giving rise to the litigation in *Tod & Son* v. *Merchant Banking Company* (1), the bank were content to make delivery of the goods without having got a direct undertaking on the part of the purchaser, but having obtained a promise by the pledgor that he would get such an undertaking. Having got that promise from the pledgor, they then made delivery of the goods. Now, in that case it was impossible to say, or at all events it was very difficult (it is not necessary

(1) 10 Court Sess. Cas. 4th Series (Rettie), 1009.

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to go further) to say, that the pledgor in making those sales made them on behalf of the bank. He did not purport to do so; he made those sales on his own account in the course of his own business. All that the bank did was to tell him that if he should make such sales, and if he would get or give a certain undertaking, then they would be prepared to make delivery of the goods, and take in place of the goods, which were their security, an undertaking from his purchaser or the undertaking which he promised to get from his purchaser. In that case the question which arises here did not arise, and could not arise, because the whole point here turns upon this: that Messrs. Page & Co., in making this sale to Messrs. Cross & Co., were selling the goods of the North Western Bank by their direction and as their agents. Therefore, I am quite unable to see that the case of *Tod & Son* v. *Merchant Banking Company* (1) is any authority for the proposition upon which the decision of this case has proceeded.

Now, it was argued at the Bar that this could not be said to be a sale by the bank of the bank's goods to Cross & Co., because Page's contract with Cross was of prior date to the bank's interest in the goods. But, my Lords, I apprehend that if an owner of goods (for this purpose the case is precisely the same as if the bank had been absolute owners) places his goods for sale in the hands of an agent, and if that agent, for the purpose of implementing an open contract which he has, delivers those goods to the person who has made that contract with him in such a way that upon delivery the sale becomes complete and the obligation to pay the price arises, that is just as much a sale of his principal's goods to that person, and just as much makes the purchaser liable to his principal and liable to be sued by his principal, as if the agent had no contract before the goods were delivered, and had afterwards made the only contract that was ever made. I do not think that could be doubted for a moment to be the English law; and I have heard no argument to suggest to me any substantial ground for holding that the law of Scotland is different in that respect.

It seems to me, therefore, upon the whole that the right of the

(1) 10 Court Sess. Cas. 4th Series (Rettie), 1009.

bank to these goods was continuous, that it was still effectual at the time of the delivery to Messrs. Cross & Co., that it was effectual at the time when this arrest of the price was made, and that a creditor of Page could not in Scotland any more than in England insist that that was a debt due from Cross to Page which he had a right to arrest as being a creditor of Page.

My Lords, it was said that in the present case there was at the time when the arrest was made no debt due from Page to the North Western Bank—that their loan had been completely discharged, and that therefore, even supposing the principles I have been putting before your Lordships be well founded, they are inapplicable to the present case, inasmuch as the bank had ceased to have any right to the pledge at all. There is no finding in the interlocutor of the facts which are the foundation of that argument; and I confess to more than a doubt whether it is possible in this appeal for your Lordships to deal with those facts and to found any judgment upon them. The utmost that could be asked would be a remit to find further facts (1). But, my Lords, I may say that the argument of the learned counsel for the respondents has not satisfied me that there is any substantial ground for that contention. It rests upon this. There was, as I have already mentioned, besides the *Cyprus* cargo, another cargo which had been pledged for this same advance. The sum of £3826, the proceeds of that cargo, had been paid into the bank. Messrs. Page & Co. had received £1900, part of the price of this *Cyprus* cargo. It was only the balance which was arrested. Instead of paying that £1900 into the bank upon the account of this advance, when they paid it in upon the 20th of April they paid it in respect of another advance. Of course, if that transaction stood it left a sum more than the amount now arrested still due upon the advance of the 4th of April. It is argued on the part of the respondents that the bank are bound as between them and Page, or at all events as between them and the arrestor, to attribute this payment to the advance of the 4th of April, and that so attributing it nothing remained due. My Lords, I am unable to follow

(1) See Judicature Act of Scotland, 1825 (6 Geo. 4, c. 120), s. 40, and *Mackay* v. *Dick* (6 App. Cas. 251).

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that argument. The whole of this transaction took place before there was any arrest, at a time when the question was a question only between Page and the bank. Nobody else had anything to do with it. It was perfectly open to Page and the bank to have arranged that that £1900, though a part of the proceeds of the *Cyprus* cargo, should go in discharge of another debt due to the bank, and that the residue of the pledged goods should be the only security for the amount remaining due upon the debt of the 4th of April. If they had entered into such an arrangement no person afterwards arresting or purporting to arrest this debt could have made any complaint of it. But it is said that they did not make the arrangement, because at the time they did not know that this £1900 was a part of the proceeds of the *Cyprus* cargo—they did not know that Page was allotting a part of the price of the *Cyprus* cargo to another advance. My Lords, surely if the bank could have come to such an agreement as I have suggested with Page on the 20th of April, they cannot be less able when they know the facts (which they did not then) to adopt the arrangement which Page so made by attributing the payment to the other advance. There is really no substance in the point at all, and I will not dwell upon it further.

The only remaining point relates to a sum of £164, which it is said was a debt due to Page & Co. in connection with this particular cargo—a claim for commission and otherwise in relation to the sale of this cargo. It is said that they at all events would have a right to claim that part of the price due from Cross & Co., inasmuch as Page & Co. would have been justified in retaining that sum before they paid over the proceeds, which would then have been the net proceeds, to the bank. My Lords, no such point appears to have been urged in the Courts below, and there are no facts found in relation to it. But I will treat the evidence as establishing the fact that this sum was properly chargeable by Page & Co. in respect of what they had done in relation to this cargo. I do not think that can establish the respondents' case as regards this arrest. What they did was to arrest a debt of £1000 odd due from Cross to Page. They cannot split up that and say, "Assuming the bulk of the debt to be due to the bank from Cross, yet a portion of

it was" (according to the contention I have just put before your Lordships) "not due to the bank, and we are entitled to say that so much may be arrested." My Lords, I apprehend that if the bank could have sued Cross & Co. at all they could have sued Cross & Co. for this entire sum, and that to the bank's action Cross & Co. would have had no answer as to any part of it, and having thus arrested a debt which, as I have said, the bank could have recovered from Cross as being the price of their property, whatever liabilities there might have been on their part to pay charges in respect of it to other people, it seems to me that the respondents' case must fail. Of course, I express no opinion whether they can recover this sum from the bank. If it has not been paid to Page or satisfied in any way, it is perfectly possible that they may be able to do so. That is a question with which your Lordships have not now to deal. It seems to me that, even assuming that this sum of money was due in respect of this cargo to Page & Co., it does not support the arrest which the respondents have made, the validity of which arrest is the only question now in issue before your Lordships.

For these reasons I move that the interlocutors of the sheriff and of the Court of Session appealed from be reversed, and the cause be remitted to the Court of Session to rank and prefer the appellants to the whole fund in medio, and to find the respondents liable to the appellants in their expenses of process in both Courts below. The appellants, of course, will have their costs of this appeal.

LORD WATSON:—

My Lords, this appears to me to be a remarkably plain case. Concurring as I do in what has been said by the Lord Chancellor, I shall only make these very general observations. When a moveable fund, situated in Scotland, admittedly belongs to one or other of two domiciled Englishmen, the question to which of them it belongs is primâ facie one of English law, and ought to be so treated by the Courts of Scotland. In this case the respective rights of Page & Co. and the appellant bank depend on transactions which took place between them in England. I see no reason to doubt that had there been any conflict between

H. L. (Sc.) 1894 NORTH WESTERN BANK v. POYNTER, SON, & MACDONALDS. Lord Watson.

the laws of Scotland and England upon the questions arising in this case it would have been proper for your Lordships to consider and apply the law of England. But, according to my apprehension, there is no difference whatever between the laws of the two countries applicable to the decision of this case.

Upon the point of law which was mainly discussed in the Courts below, and which is disposed of by the last finding in the interlocutor appealed from, I have no hesitation in differing from the majority of the Second Division and concurring in the clear and satisfactory judgment of Lord Young. The argument submitted for the respondents upon that point is, in my opinion, not borne out by the dicta of institutional writers to which they referred, and the case of *Tod & Son* v. *Merchant Banking Company* (1), upon which they also relied, if it has any bearing upon this case, is an authority the other way.

I was somewhat impressed at the time by the argument of Sir Richard Webster in regard to the respondents' alternative claim for £164 19*s.* 2*d.* But, assuming that the appellants may be liable to satisfy the claim, that circumstance can give the respondents no nexus upon the fund in medio, and they could not obtain any preference by an arrestment directed against Page & Co. In these circumstances, I think the respondents must enforce their demand in a new action, and that this suit ought not to be prolonged by a remit to have it tried as a riding claim.

LORD MACNAGHTEN :—

My Lords, I concur.

Ordered and Adjudged, That the said Interlocutor of the Sheriff-Substitute of Lanarkshire at Glasgow, of the 18th of April, 1893, *and also the said Interlocutors of the Lords of Session in Scotland, of the 2nd (signed 20th) of February and the 9th of March,* 1894, *be, and the same are hereby reversed: And it is further Ordered, That the Cause be, and the same is hereby remitted back*

(1) 10 Court Sess. Cas. 4th Series (Rettie), 1009.

to the Second Division of the Court of Session in Scotland, with directions to rank and prefer the appellants, the North Western Bank, Limited, to the whole fund in medio, *and to find the respondents, John Poynter, Son, and Macdonalds, liable to the said appellants in their expenses of process in both Courts below: And it is further Ordered, That the said respondents do pay or cause to be paid to the said appellants the costs incurred in respect of the said appeal to this House, the amount thereof to be certified by the Clerk of the Parliaments: And it is further Ordered, That the said respondents do repay to the said appellants any expenses already paid to the respondents by the appellants under the Interlocutors reversed.*

Lords' Journals 16th November 1894.

Agents for the appellants: *Wynne, Holme, & Wynne, for Simpson, North, Harley, & Birkett, Liverpool;* and *Webster, Will, & Ritchie, S.S.C., Edinburgh.*

Agents for the respondents: *Lowless & Co., for Campbell Faill, S.S.C., Edinburgh.*

[PRIVY COUNCIL.]

J. C.*
1894
Nov. 8;
Dec. 8.

In re SEMET AND SOLVAY'S PATENT.

Patent Law Amendment Act, 1852, *s.* 25—*Patents, Designs, and Trade Marks Act*, 1883, *s.* 25 (4)—*Extension of Patent after Foreign Patent had Lapsed.*

Where a British patent granted before the passing of the Patents, Designs, and Trade Marks Act, 1883, was prior in date to patents for the same foreign invention obtained by the same patentee in seven foreign countries, five of which were still in force, but two of which had lapsed owing to non-performance of the condition of grant:—

Held, that, according to the rule laid down in sect. 25, sub-sect. 4, of the Act of 1883 (sect. 113 of which repealed sect. 25 of the Patent Law Amendment Act, 1852), the Committee had a discretion to extend the patent whether or not it had been the first granted, with due regard to the circumstances connected with the foreign patents.

Extension granted, as the evidence did not suggest that the inhabitants of the United Kingdom would be prejudicially affected thereby in their foreign competition.

THIS was a petition for extension of a patent granted on the 17th of November, 1880, to the above-named Semet and Solvay, of Brussels, for the invention of "improvements in apparatus for coking and distilling coal" under the circumstances stated in the judgment of their Lordships.

Sir Richard Webster, Q.C., and *Waggett*, for the petitioners, contended that the rule which prevailed of not extending a patent if there were foreign patents on the point of expiring did not apply. They referred to sect. 25 of the Patent Amendment Act, 1852 (15 & 16 Vict. c. 83), which says that a British patent for a foreign invention shall cease on the expiring of a foreign patent previously granted; which section is repealed by sect. 113 of the Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57). See also sect. 25, sub-sects. 4 and 5, of the Act of 1883, and sect. 45; *Singer* v. *Stassen* (1); *Livet's Patent* (2).

* *Present:*—Lord Watson, Lord Hobhouse, Lord Macnaghten, Lord Shand, and Sir Richard Couch.

(1) 1st Reports of Patent Cases, 125. (2) 9th Reports of Patent Cases, 327.

[Lord Watson referred to *Newton's Patent* (1).] A term concurrent with the Belgian patent, practically six years, was sought; non-user in this case was explained: see *Hughes' Case* (2).

The Attorney-General (*Sir R. T. Reid*), and *Sutton*, for the Crown, contended that the petitioners were not entitled to the benefit of the Act of 1883, since the petition had not been filed six months before the expiry of the patent, and were therefore remitted to the law as it stood before that Act. [Lord Watson:—Does the Act of 1852 relate directly or by necessary inference to cases where the English patent is first in date?] No, but it is contended that such cases are within the policy and spirit of that Act; see *Jablochkoff's Patent* (3); *Newton's Patent* (1); *Betts' Case* (4); *Hill's Patent* (5); *Normand's Patent* (6). [Lord Hobhouse:—The rule of this Board was founded on sect. 25 of the Act of 1852, which has been since repealed.] *Winan's Patent* (7); *Blake's Patent* (8).

Waggett replied, contending that the circumstances should be considered by the light of sect. 113 of the Act of 1883, which repealed sect. 25 of the Act of 1852.

Their Lordships forthwith reported to Her Majesty in Council that the patent should, in their opinion, be prolonged for a period of five years; and on the 8th of December their reasons for such report were delivered by

Lord Watson:—

The letters patent of which an extension is craved were issued to the petitioners Semet and Solvay, who were the inventors, upon the 17th of November, 1880. At that date the invention was not protected in any foreign country, but patents were subsequently obtained in France, Germany, Austria, Belgium, the United States, Russia, and Spain. With the exception of

(1) 15 Moo. P. C. 176.
(2) 4 App. Cas. 174.
(3) [1891] A. C. 293.
(4) 1 Moo. P. C. (N.S.) 49.
(5) 1 Moo. P. C. (N.S.) 258.
(6) Law Rep. 3 P. C. 193.
(7) Law Rep. 4 P. C. 93.
(8) Law Rep. 4 P. C. 535.

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the last two, these patents are still in force. The French patent will expire in the course of next year, the German in 1896, the Austrian in 1897, and those for Belgium and the United States in the year 1900. The Russian and Spanish patents have lapsed, in consequence of the failure of the patentees to comply with a condition of their exclusive privilege, which required that the invention should be brought into actual operation within a time limited.

The patentees have assigned their whole interest in these patents to the other petitioners, the Société Solvay et Compagnie, a concern in which they are both shareholders. The petitioner Solvay is a director of the company, whilst the petitioner Semet is employed by the company, and receives, as remuneration, a percentage of the profits derived from the use of the invention.

The patent is for improvements in apparatus for coking and distilling coal; and its chief merit appears to consist in the substitution of fire-clay tubes for the brickwork flues, forming part of the structure of the kilns or ovens, which were previously in use for carrying off the products of combustion. The advantage of the substitution is two-fold. In the first place, it prevents the escape of these products from the flue into the oven, through leakage, to the detriment of the coke; and, in the second place, it permits the repair of the flues without taking down the brickwork of the oven. Although the invention is apparently a very simple one, it is proved to be of considerable commercial utility. It not only effects a saving in the cost of maintaining the coking apparatus, but it yields a much larger percentage of coke, with a considerably increased amount of the products of distillation. Their Lordships have, in these circumstances, had no difficulty in coming to the conclusion that the invention is of sufficient merit to justify them, if the other circumstances of the case be favourable, in recommending an extension of the patent.

That neither the patentees, nor the company which has been engaged in bringing their invention under the notice of the public in this and in other countries, have been adequately remunerated, is established beyond doubt. The accounts produced and proved shew a large debit balance; and the cross-

examination of the petitioners' witnesses by counsel for the Crown, and their observations upon the evidence, merely went to shew that the pecuniary loss of the petitioners may ultimately prove to be less than they anticipate. In some circumstances, the fact that such losses have been sustained during the currency of the patent might go far to shew that the patented invention was not of public utility; but their Lordships are satisfied that there is no room for such an inference in the present case. The invention appears to them to be one which, from its very nature, cannot reasonably be expected to come at once, or within a short period, into general use. Its adoption necessitates the destruction of existing and the erection of new apparatus; and will, therefore, in all probability be gradual, as the old-fashioned apparatus wears out.

Their Lordships' attention was very properly directed by the Attorney-General to the enactments of sect. 25 of the Patent Law Amendment Act, 1852, which apply to cases where a foreign invention has not been first patented in the United Kingdom; and also to a series of decisions of this Board, in which it was held that cases in which the foreign invention was first patented in this country, though not within the letter, were within the spirit of these enactments. Their Lordships do not consider it necessary to notice these decisions in detail. In this case, the patent is dated before the passing of the Patents, Designs, and Trade Marks Act, 1883; and had it not been the first granted in any country, the question might have arisen whether, having regard to the terms of sect. 113 of the later statute, their Lordships were bound to deal with the case as falling under sect. 25 of the Act of 1852. But their Lordships do not think that, prior to the passing of the Act of 1883, this Board had laid down any rule to the effect that cases in which the British patent was the first were within the spirit of sect. 25, in such sense that its enactments ought to be strictly applied to them. The decisions already referred to go no farther than to establish that, in dealing with such cases, the lapse of patents for the same invention in foreign countries, and the policy of the Legislature, as indicated in sect. 25, were circumstances to be taken into account in considering whether a prolongation ought to be granted. Thus,

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In re Betts' Patent (1), three patents had been obtained—in Britain, France, and Belgium, the British being the first of them; and this Board advised Her Majesty to grant an extension for five years, although the Belgian patent had expired before the date of the application for renewal.

Their Lordships are of opinion that, inasmuch as sect. 25 of the Act of 1852 does not apply to it, the present case must be dealt with under the provisions of the Act of 1883, and therefore on the footing that sect. 25 has been repealed by the Legislature. The rule laid down for their guidance by sect. 25, subsect. 4, of the later Act is to the effect that, "The Judicial Committee shall, in considering their decision, have regard to the nature and merits of the invention in relation to the public, to the profits made by the patentee as such, and to all the circumstances of the case." The practical result of that legislation is, that the Committee are no longer deprived of the right to recommend, in their discretion, the extension of a patent which is not the first, in cases where one or more foreign patents for the same invention have lapsed or expired. But the lapse or expiry of foreign patents remains, as it always has been, one of the circumstances which must necessarily be considered. It is a circumstance which may prejudicially affect the interests of the inhabitants of the United Kingdom; and it is therefore one which must be taken into account, along with the other facts of the case, where there is no patent for the invention outside the United Kingdom, as well as in cases where foreign patents exist or have existed.

In cases where the prolongation of a patent would place the inhabitants of Great Britain and Ireland at a disadvantage in competition with the subjects of a foreign State, that circumstance must militate strongly against its extension. Whether the disadvantage, either certain or probable, ought to outweigh the right of the patentee to obtain a renewal upon other grounds, must always be a question of degree, to be decided according to the special circumstances of each case.

In the present case, the evidence does not suggest that there is much, or any appreciable, competition in the markets of the

(1) 1 Moo. (N.S.) 49.

world, between coke of British and of foreign manufacture, or between articles British and foreign, which depend for their manufacture upon the use of coke as fuel. Then, in Russia and Spain, the two countries in which the patents taken out for the present invention have lapsed, the evidence shews that the invention is not used. In these circumstances, their Lordships have come to the conclusion that the patent ought to be extended for the term of five years; and they have humbly advised Her Majesty to that effect.

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Solicitors for the petitioners: *Steavenson & Couldwell.*
Solicitor for the Crown: *The Treasury.*

[PRIVY COUNCIL.]

ATTORNEY-GENERAL FOR TRINIDAD AND TOBAGO . . . . . } PLAINTIFF;

AND

BOURNE AND OTHERS . . . . . DEFENDANTS.

J. C.* 1894 *Nov.* 29; *Dec.* 15.

ON APPEAL FROM THE SUPREME COURT OF TRINIDAD AND TOBAGO.

Action of Ejectment by the Crown—Equitable Defence—Specific Performance.

In an action of ejectment by the Crown a defendant may set up any equitable defence which would have availed against a private plaintiff.

Judgment held to have been rightly entered for the defendant, where a concluded contract with the Crown was proved entitling him to the issue of a grant in respect of the land in suit.

APPEAL from a judgment of the Supreme Court (Jan. 11, 1892), reversing a judgment of Lumb J. (May 20, 1891).

The facts are stated in their Lordships' judgment.

Lumb J. held that the prerogative of the Crown in matters affecting the rights or revenue of the Sovereign had not been affected by the Judicature Acts, and that in Crown proceedings initiated by information of intrusion the only title to be

* *Present*:—LORD WATSON, LORD HOBHOUSE, LORD SHAND, and SIR RICHARD COUCH.

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recognised is a legal title, and that no equitable ownership can prevail against the Crown.

The Supreme Court held on the authorities that an equitable defence was available, as if it were a case between subject and subject.

Cozens-Hardy, Q.C., and *G. Lawrence*, for the appellant, did not contend that an equitable defence by a subject against the Crown did not avail, but that owing to lapse of time and other circumstances specific performance of the contract relied on by the respondents could not be decreed. There is no jurisdiction to decree specific performance against the Crown and to order it to convey the legal estate. No procedure exists for enforcement of such claim. Reference was made to *Hodge* v. *Attorney-General* (1). Under the Real Property Ordinance of 1889 (see particularly clauses 11 and 12) there is no jurisdiction to bring land under its provisions unless it has been the subject of a Crown grant.

Mayne, for the respondents other than Bourne; and
H. F. Wilson, for Bourne, were not heard.

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The judgment of their Lordships was delivered by

LORD WATSON:—

This suit commenced with a writ of intrusion, at the instance of the appellant as representing the Crown, the object of the writ being to have the respondents Victor Schwap and Joaquin Ribeiro, his tenant, removed from possession of an acre of land adjacent to the Pitch Lake at La Brea, which was alleged to be unalienated Crown land. Whether these respondents had the right to set up any equitable plea in defence to the action was one of the main subjects of controversy in the Courts below. Lumb J. held that they had not, and gave judgment for the Crown, on the ground that they had neither alleged nor shewn a legal title. On appeal, the majority of the Full Court, consisting of the late Gorrie C.J. and Cook J. overruled his finding upon the first point, and entered judgment for the

(1) 3 Y. & C. Ex. 342.

defendants, on the ground that they had established a good equitable defence. At the hearing of this appeal, counsel for the appellant conceded (very properly, in the estimation of their Lordships) that, notwithstanding the form of the action, every defence was available to the respondents which would have been open to them in an ejectment suit at the instance of a subject.

It is not disputed that, in the year 1868, the land was within the title of the Crown, and had never been alienated. From the year 1862 until that date it had been possessed by the respondent Schwap as a squatter, or, in other words, without any title either legal or equitable. In April, 1868, the Colonial Secretary issued a letter of instructions to the warden of the district in which the land is situated, specifying the terms and conditions upon which grants of Crown land were to be made to persons willing to purchase. One of these conditions is material to the present case: "In cases of occupation before the 1st of January, 1868, the occupant is to be allowed the option of paying at the rate of £2 per acre by instalments, but you are at liberty to accept from any petitioner any amount that may at any time be tendered by him in aid of the purchase of the land prayed for—the Crown reserving to itself the right to decline to grant the land should it be thought undesirable to do so—in which case the amounts paid will be returned to the persons from whom they were received."

Schwap thereupon lodged a petition stating that he was desirous of becoming the purchaser of the land, and praying that the Governor might be pleased to order that it should be sold. It is admitted that the upset price of the lot was fixed at $18·52, and also that Schwap, who was allowed to continue in possession, on the 10th of June, 1868, paid $5·20 to the warden, and received from that official an acknowledgment bearing that the payment had been made "on account of one acre land and a small house petitioned for at La Brea." The effect of these transactions was to raise an equitable contract for the sale and purchase of the land at the upset price, defeasible at the instance of the Crown, at any time before the issue of a grant to the purchaser, on repayment of the sum paid to account.

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From the year 1868 until the year 1889 no action was taken upon the contract by either of the parties to it. Schwap made no farther payment to account during that period, but continued in undisturbed possession of the land.

It was pleaded by the respondents Schwap and Ribeiro, in the Courts below, that, in the circumstances of the case, the delay which thus occurred had the effect of extinguishing the right of the Crown to exercise its reserved power of defeasance—a proposition which was controverted in the argument addressed to this Board by counsel for the appellant. In the view which their Lordships take of the present appeal, it is unnecessary for them to express any opinion upon the point.

After the date of the transactions in 1868 already noticed, no communication passed between the Crown and Schwap, with reference to the land in question, until the year 1889. Meanwhile the Crown had, on the 12th of July, 1888, granted an exclusive licence for the term of fourteen years to certain concessionaires to work and win all asphaltic and bituminous substances from the Pitch Lake at La Brea. There was no demise except of the lake itself; but the deed of grant contained a covenant binding the Crown, during the currency of the licence, not to permit the winning or carrying away of such substances from any lands within three miles of the Pitch Lake which then were, or might thereafter come, into the possession of Her Majesty, without the previous consent in writing of the concessionaires.

Early in 1889, Schwap presented a second petition to the Governor, in which, after referring to his application in 1868, and the fact that he had paid $5·20, he prayed that his Excellency might order a grant to be issued in his favour on payment of survey fees. On the 8th of May, 1889, he received an answer from Mr. Wilson, the Sub-Intendant of Crown Lands, which concluded with this intimation: "His Excellency is prepared to grant you the land in question on payment of the usual upset price and fees, subject however to the reservation and condition that no asphalt be dug or removed from it."

Schwap did not accede to the terms thus offered by Mr. Wilson. On the 16th of October, 1889, he leased the land for

ten years to the respondent Ribeiro, at an annual rent of $180, with power to the lessee to win and work asphalt, pitch, and other minerals. It was suggested by the appellant's counsel, and it is certainly probable, that the rent was greatly enhanced by the insertion of that power in the lease. On the 21st of November, 1889, Schwap made an application, under the provisions of the Real Property Ordinance No. 8 of 1889, to have his name entered on the Register of Titles, as owner in fee simple of the acre of land in question—a proceeding which became known in due course to the officers of the Crown.

The Sub-Intendant's letter to Schwap of the 8th of May, already noticed, indicates that the writer was not satisfied that any sum had been paid to account in 1868, because he therein makes payment of the full upset price one of the conditions upon which the Crown was prepared to issue a grant. On the 27th of November, 1889, he sent another written communication to Schwap, which their Lordships regard as of crucial importance. It refers to the letter of the 8th of May, and explains that the proceedings of 1868 had since come to light, from which it appeared that Schwap had then applied for a grant of the lot, and had deposited the sum of $5·20 on account of the purchase-money. It then proceeds to intimate: "In these circumstances the administrator has been pleased to order that a royal grant in respect of this lot be issued to you on payment of the sum of $13·32, being the difference between the price of an ordinary village lot, i.e. $18·52 and the sum already deposited $5·20."

It is admitted that, on the 28th or 29th of November, Schwap went to the Land Office, and there tendered payment of the balance of $13·32, which was declined.

Upon the 30th of November, 1889, the Sub-Intendant again wrote to Schwap in the following terms: "With reference to my letter No. 1545 of the 27th instant, I am directed by the administrator to inform you that an appeal has been made to the Secretary of State against the issue to you of a grant in respect of the lot of land at La Brea claimed by you, and, under the circumstances, his Excellency thinks that, as he understands you have already applied for the registration of a title to the

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land in question, you had better proceed with your application under the Real Property Ordinance, the Crown merely entering a formal caveat in the matter for the balance of the purchase money."

The appellant now maintains that the letter of the 27th of November does not either modify or retract the proposal, made in that of the 8th of May, to insert a condition in the grant, that no asphalt should be dug or removed from the land. He argued that the contents of the later writing only amount to an explanation that the Crown, having ascertained that $5·20 had already been paid, was willing to accept $13·32 as payment in full of the price. Had that been all that it was meant to convey, the letter could hardly have been conceived in terms more inappropriate. Their Lordships are satisfied that such is not the primary or true meaning of the document; and that it expresses the willingness of the Crown to give a clean title to Schwap upon his paying the balance therein specified. That the letter was understood in that sense by the officials of the Crown, at the time when it was written, plainly appears from the terms of their letter of the 30th of November. The asphalt concessionaires, who are admittedly the persons therein referred to as having made an appeal to the Secretary of State, could have had no possible cause of complaint, if the reservation indicated in the letter of the 8th of May was to be inserted in the grant to Schwap. It is quite intelligible that, in order to avoid controversy with these persons, the Crown might prefer that Schwap should establish a legal title by obtaining registration, instead of receiving a grant at that time. Accordingly, the letter conveys to him an intimation that he had better proceed with his application to the Registrar, which was for a title absolute and without reservation; and it also conveys to him the assurance that, if he did so, the Crown would not oppose the application, but would merely lodge a formal caveat, for the purpose of securing payment of the balance of $13·32, before the certificate of title was issued.

In these circumstances their Lordships are of opinion that Schwap's acceptance of the terms offered in the letter of the 27th of November, by duly tendering payment of the balance,

constituted a concluded contract, from which neither party could retire without the consent of the other, and that it had the immediate effect of determining any option to refuse a grant of the land which the Crown may have previously possessed. That is practically the same ground upon which the decision of the majority of the full Court was based.

Their Lordships will, therefore, humbly advise Her Majesty to affirm the judgment appealed from. The appellant must pay the costs incurred by the respondents, including the respondent Hugh Clarence Bourne.

Solicitors for appellant and respondent Bourne: *Sutton, Ommaney, & Rendall.*

Solicitor for other respondents: *W. T. G. Hooper.*

[PRIVY COUNCIL.]

J. C.* 1894 *July* 17; *Nov.* 10.

MAYOR, ALDERMEN, AND CITIZENS OF CANTERBURY . . . . . } APPELLANTS;

AND

WYBURN AND THE MELBOURNE HOSPITAL . . . . . } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Law of Mortmain—51 & 52 *Vict. c.* 42—*Gift of Money by Colonial Will to be invested in Land in England.*

51 & 52 Vict. c. 42, which consolidates the Mortmain Acts, and in effect prohibits the gift of money by English wills to be invested in land in England for charitable purposes, does not apply to colonial wills.

Where a domiciled Victorian by will gave money to an English corporation for the purchase of land in England for charitable purposes:—

Held, that the gift was governed wholly by the law of Victoria, and, being valid by that law, bound the executors to pay the legacy to the corporation.

Attorney-General v. *Mill* (2 Dow & Cl. 393) distinguished as relating to an English will.

APPEAL from a judgment of the Supreme Court (May 19, 1893), reversing a judgment of A'Beckett, J. (Oct. 14, 1892).

* *Present*:—THE EARL OF SELBORNE, LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, LORD SHAND, and SIR RICHARD COUCH.

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The question decided was as to the effect to be given to a certain legacy of £10,000, under the will of a testator who died in 1891, domiciled in the Colony of Victoria, to the appellants for the purpose of buying a piece of ground at Canterbury, in Kent, and erecting a free library and reading-room thereon.

The facts of the case and the proceedings in the Courts below are stated in the judgment of their Lordships. Those proceedings were originated by a summons issued by the respondents, the executors.

The Supreme Court held that the gift was primâ facie good under the law of Victoria, because there was no law in the Colony which forbade the application of lands in Victoria in perpetuity to charitable purposes. The bequest, however, "could not be carried out consistently with the provisions of the law of England, and therefore must lapse. The land to be purchased is in England, and the corporation to which the money is bequeathed is in England, and the English law must govern the operation of the bequest."

The Attorney-General (Sir *John Rigby*), and *Method*, for the respondents, the Melbourne Hospital, who represented the residuary legatees under the will, were by consent heard first in support of the judgment appealed from. They contended that the gift in question was invalid and void. English law applied to the case, for the direction in the will was for the purchase and dedication of land in England by a corporation for charitable purposes. If a Victorian testator owned land in England he could not devise it by this will for those purposes. Nor can he bequeath money to be invested in English land for those purposes. The law of mortmain is a part of English real property law. The question was not one affecting merely the ability or disability of particular persons according to their domicile, but one which related to the disposition of real property situated in England. If the gift had been made by will by a person domiciled in England it would admittedly have been void. A testator domiciled in Victoria has no more power to direct by will the purchase of land in England for charitable purposes than a person domiciled in England has.

The effect of the Mortmain Acts (see especially 51 & 52 Vict. c. 42) was to prohibit the tying up of land by will, vesting it in a dead hand; and such prohibition fastens on the land irrespective of the abilities or disabilities of a testator under his personal law. The prohibition fastening on the land relates back, as it were, to the gift by will which directs the acquisition of land. Reference was made to *Sorresby* v. *Hollins* (1); *Attorney-General* v. *Day* (2); *Attorney-General* v. *Stewart* (3); *Whicker* v. *Hume* (4); *Attorney-General* v. *Graves* (5); *Oliphant* v. *Hendrie* (6); *Mackintosh* v. *Townsend* (7); *Attorney-General* v. *Mill* (8), which, it was contended, was a case of a Scottish will held to be void as directing money to be laid out in English land, and was treated as a Scottish will by the following writers: Story's Conflict of Laws, s. 446; Westlake's Private International Law, 3rd ed. p. 191; Sugden's Law of Property, p. 419.

Everitt, Q.C., and *Dauney*, for the appellants, contended that the judgment was erroneous. The testator was domiciled in Victoria at the date of his will and his death, and his will must be construed to take effect according to the laws in force in the Colony. By those laws the gift was valid, for the English Statutes of Mortmain have never been introduced into Victoria; and accordingly there was nothing to prevent a testator domiciled therein from giving money by will for purchase of land in any part of the world for charitable purposes. English law, it was contended, had nothing to do with the bequest, and the appellants were entitled to receive the money under the will, and to invest the same in land by purchasing the same in any mode prescribed or allowed by English law. The English Statutes of Mortmain impose disabilities upon English testators. They do not prohibit all gifts of land for charitable purposes; they merely prescribe a particular mode of acquisition. There is nothing in those Acts which prevented the testator from purchasing English land for charitable purposes in his lifetime, or directing such

(1) 9 Mod. 221.
(2) 1 Ves. Sen. 218.
(3) 2 Mer. 143.
(4) 7 H. L. Rep. 124.
(5) Amb. 155.
(6) 1 Br. C. C. 571.
(7) 16 Ves. 330.
(8) 3 Russ. 328; and in appeal, 2 Dow & Cl. 393.

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purchase after his death. The disabilities imposed are purely local. Under the terms of the Act they do not apply to either Scotland or Ireland, and the cases cited on the other side decide that they do not apply in the Colonies.

C. E. Jones, and *Dunlop Hill*, for the executors.

1894. Nov. 10. The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

On the 13th of June, 1891, J. G. Beaney, an inhabitant of Melbourne and a domiciled Victorian, died, having by a codicil to his will bequeathed legacies to the appellants in the following terms:—

"I direct my said trustee to pay to the mayor and corporation of the said city of Canterbury for the time being the sum of ten thousand pounds, for the purpose of their buying a suitable piece of ground at Canterbury aforesaid and erecting thereon with as little delay as possible a free library and reading-room for the working classes; such building when erected to be called 'The Beaney Institute for the Education of Working Men.' And I also bequeath to the said mayor and corporation of the said city of Canterbury all my medical diplomas and military commissions for the purpose of their being hung up and exhibited in the principal hall of the said building so to be erected as aforesaid."

By another codicil he bequeathed some more articles of a like kind in a like way. His residuary legatees are certain charitable institutions in Melbourne, of whom the respondents, the Melbourne Hospital, have been selected to defend the interests of all. They contend here that the gift of £10,000 to the appellants must fail by reason of the English statute law which restricts gifts to charitable uses.

The case was argued before A'Beckett, J., upon certain questions propounded for the Court to answer; and by his answers that learned judge maintained the validity of the gifts, and directed the executors to comply with the directions of the

testator. He finds that there is nothing in the law of Victoria to forbid such a testamentary gift. He adds:—

"If it had been shewn that under the law as it stands in England the corporation of Canterbury could not lawfully spend £10,000 in buying land and erecting a building as contemplated by the testator, and therefore that the object of the testator could not lawfully be accomplished, I should not direct the executors to pay the legacy to the corporation. This has not been shewn. It appears that the corporation could lawfully have expended £10,000 in this manner if the testator had sent the money to them in his lifetime, and that they will have the right to spend it in this manner if sent them by his executors as directed by his will."

The residuary legatees appealed, and the Full Court varied the decision of the First Court by holding that the bequest of money was invalid, and, the residuary legatees consenting, that the bequests of chattels were valid. The reasons of the three learned judges are in substance identical. They consider that as the £10,000 is given for the purchase of land in England the case is the same as if the testator had actually devised land of his own in England, and they argue, justly enough, that nobody can so operate on English land.

From their order, holding the bequest of money invalid, the present appeal is brought; and their Lordships have to consider whether it is right. Of course, there is no doubt of the competency of the English Legislature to forbid such gifts. The question is whether it has done so. It would seem that this is the first occasion on which such a question has come into Court for decision.

It appears to their Lordships that the arguments relied on by the Full Court, and by the respondents' counsel at this bar, err in exaggerating the amount of prohibition imposed by the English statutes, and in ascribing to it a more absolute effect than it really has. The Attorney-General indeed, in his argument for the residuary legatees, insisted on the title of the Act of 9 Geo. 2, c. 36, passed in the year 1736: "An Act to restrain the disposition of lands, whereby the same become unalienable." That title correctly expresses the object of the Act; but it is

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manifest from the preamble and the operative parts of the Act that it does not purport to restrain every such disposition, nor does the title say that it does. If there were an absolute prohibition of all gifts of land for charitable uses, Mr. Beaney's gift could not take effect. But as in fact the English statutes leave all persons as free as they were by Common Law to give or to receive any amount of land for those purposes, provided only that they observe the positive rules prescribed for them, the question in each case is whether the mode of acquiring land is a lawful or a forbidden one.

The statute which now governs this question was passed in the year 1888 (51 & 52 Vict. c. 42), and, according to a recent practice, it has no preamble to give the key to its policy. But it is mainly an Act of consolidation; if it effects any alteration in the previous law, the difference does not concern the question now to be decided; and it must be taken that its provisions rest upon precisely the same policy as those of the statute 9 Geo. 2, c. 36.

The preamble of that statute refers to the older statutes passed to restrain the mischiefs of gifts in mortmain. Then it proceeds: "Nevertheless this publick mischief has of late greatly increased by many large and improvident alienations or dispositions made by languishing or dying persons, or by other persons, to uses called charitable uses, to take place after their deaths, to the disherison of their lawful heirs; for remedy whereof be it enacted." This, then, was the mischief which the Legislature desired to abate: the increase of land held in mortmain by gifts which may for brevity, and somewhat loosely, be termed death-bed gifts. The mode taken to restrain this mischief was to enact that no land, nor any money to be laid out in the purchase of land, should be given to any person for the benefit of any charitable use, unless the gift be made by deed executed twelve calendar months at least before the death of the donor, and enrolled in Chancery within six calendar months of its execution, and unless the gift be made to take immediate effect. Another section extends the prohibition to charges affecting land, which is a large class—at that date a much larger relative class than now—of personal estate; and it declares that the prohibited gifts

shall be absolutely null and void. Therefore, in all cases of wills to which the statute applies, such gifts are prohibited by its express terms.

It is expressly enacted that the statute shall not extend to the grant of any estate in Scotland. After a time came the question whether it extends to the Colonies, and that question was settled in the negative in the case of *Attorney-General* v. *Stewart* (1), decided by Sir William Grant in the year 1817. He considered that both the mischief struck at by the Act, and the methods prescribed for lawful gifts, were of a local character peculiar to England. Therefore, he held that the Act did not extend to Grenada, though it is in general terms, and though the laws of England had been extended in general terms to the island when first ceded in 1763, and again when recovered in 1784. That opinion has ever since prevailed, and in the case of the Gilchrist foundation (*Whicker* v. *Hume*) (2) it was applied to a gift of land in New South Wales.

In that state of the law the present Act of 1888 was passed. By sect. 4, sub-sect. 1, it is enacted thus:—

"Subject to the savings and exceptions contained in this Act, every assurance of land to or for the benefit of any charitable uses, and every assurance of personal estate to be laid out in the purchase of land to or for the benefit of any charitable uses, shall be made in accordance with the requirements of this Act, and unless so made shall be void."

The requirements of the Act are substantially those of the Act of 1736. If the assurance is of personal estate not being stock in the public funds, it must be made by deed enrolled within six months of the execution, and, if it is not made for full valuable consideration, executed twelve months before the death of the assurors. By the interpretation clause the term "assurance" includes a will. This Act therefore, subject to some special exemptions, prohibits "death-bed" gifts as strictly as does the earlier Act. But it is impossible to suppose that the English Legislature intended to affect a will subject to the law of Victoria. All the reasons against such a construction which were applied to the earlier enactment apply to the later one.

(1) 2 Mer. 143. (2) 7 H. L. Rep. 124.

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It is expressly declared that the Act does not extend to Scotland or Ireland. To declare that a bequest made by a colonial will shall be void on the ground that it contravenes the local law of England may not be beyond the competence of the Imperial Parliament, but is quite beyond its ordinary scope, and such an intention ought not to be imputed to it without very clear grounds. Seeing, indeed, that the repealed and consolidated statutes did not apply to the Colonies, and that Scotland and Ireland are expressly excepted from the new statute, it is impossible without express words to suppose that there was any intention of affecting the Colonies by the new statute. Moreover, Sir Wm. Grant's other reasons apply exactly to the present question. It cannot have been intended that methods of a local character prescribed for making a lawful gift should be adopted in a distant colony, or, if not, that the gift should be invalid.

Indeed, the case for the residuary legatees is not rested on any such broad ground as this. The Courts below are agreed that the Victorian testator is quite free to make such a gift as he has made; nor has the contrary been contended here. But for that conclusion the word "assurance" in the Act must receive the qualification that it means something which is governed by English law.

Of course it is a different thing to say that English law must decide whether English land can be bought with money coming from such a source as a foreign will; and that, if it decides in the negative, the bequest must fail, not because it is illegal, but because it is impossible of execution. The Attorney-General stated broadly that the prohibitions of the Statutes of Mortmain are an integral part of the English law of real property. So they are; but the question is how far they operate. The suggestion is that they operate to invalidate gifts of money coupled with an obligation to lay them out in land, if they have their origin in a will, though a perfectly valid will. Their Lordships cannot find such a prohibition in the Act. They have reached the conclusion that this will is not invalidated by sub-sect. 1. At what point, then, of the transactions does the English law come in? Not between the Victorian testator and his Victorian executor. In their Lordships' view the English law will operate

whenever a purchase of land for the charitable uses is effected, but no earlier. The assurance of that land must be made in accordance with the provisions of the Act. Anybody may give money for such a purpose in the permitted mode. The testator might himself have bought land in Canterbury and have devoted it to charitable uses quite lawfully. What he might do himself he might do through trustees, by giving money to trustees for the purpose of acquiring land in a lawful way. Is there anything to prevent him from ordering his executors to do the same thing? The answer is that his will is not affected by English law. It is a valid will binding on his executors; and a Victorian Court of Justice should direct them to perform their obligation.

It has been contended very earnestly that the point is settled by the decision in *Attorney-General* v. *Mill.* (1) In that case the testator was a native of Montrose. He spent many years in the island of Cariacou, where he owned land and amassed a large fortune. He returned to Montrose, and stayed there about five years. Then he came to England, and resided first in London and afterwards in Bath, up to his death in 1805, fourteen years afterwards. In 1791 he executed a will and a deed, by which he gave money to be invested in the purchase of land, ordering the income to be paid to certain Scottish trustees for the benefit of indigent ladies in Montrose. His will, with four codicils, all in English form, was proved in England. In his will and contemporaneous deed he described himself as of the island of Cariacou, now residing in Marylebone. His codicils, it was stated at the bar, contained similar descriptions. His foreign assets were transmitted to England and were administered under the direction of the Court of Chancery and were the subject of a decree which paid no regard to the charitable gift. Subsequently an information was filed by the Attorney-General for the establishment of the charity by purchase of land in Scotland. It was held by Lord Lyndhurst, first in Chancery and afterwards in the House of Lords, that the testator must be taken to have directed the purchase of land in England, and that his gift contravened the mortmain laws and was void.

(1) 2 Dow & Cl. 393.

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It is now argued that the testator was a domiciled Scotsman, and that the case decides that a bequest of money in a Scottish will directing the purchase of land in England for a charity is a void bequest. But the assumption that the testator had a Scottish domicile is not warranted by anything to be found in the reports. In the meagre history of his life there is much to suggest arguments for an English domicile, and the counsel for the Attorney-General who was contending for the validity of the gift did not suggest any other domicile. The word "domicile" occurs only twice in the reports of the case. In one of them (1) the reporter uses a casual expression to the effect that on leaving Cariacou the testator resumed his domicile in Montrose; an expression which Lord St. Leonards, writing many years afterwards, repeated. But the Scottish origin of the testator, and his connection with Montrose, were only used as arguments to shew that he contemplated the purchase of land in Scotland—a conclusion which one of the reasons appended to the appellant's case urged the House to adopt "even if he were domiciled in England." For some reason, doubtless a sufficient one, it was the common ground of argument that the will was governed from first to last by English law. There is not a trace in the reported statements, arguments, or judgments that anybody asked what would be the effect of a will not governed by English law, which is the question now propounded to their Lordships.

It is true that Story J. (Conflict of Laws, sect. 446) and Mr. Westlake (Private International Law, sect. 165) both treat the decision as covering the case of a foreign will. But on examining the case that appears to their Lordships to be a misapprehension of the point really decided. So far as they know, the present question is wholly untouched by authority.

The Attorney-General dwelt on the amount of land which might be brought into mortmain if such bequests as these were allowed to take effect. Such considerations can hardly influence the construction of a statute except so far as they may appear to have been present to the minds of its framers. Their Lordships can hardly suppose that any one would feel alarm at the idea of foreigners giving large sums of money to English purposes; and

(1) 2 Dow & Cl. 394.

if it be true that this is the first case of its kind to come into Court, the experience of a century and a half tends to prove the futility of any such alarm. But, however that may be, their Lordships must construe the words of the statute according to their plain meaning, and leave it to the Legislature to enact further prohibitions, if found expedient.

The result is that their Lordships will humbly advise Her Majesty to discharge the order of the full Court, except so far as it deals with the specific chattels and with costs. This will in effect restore the judgment of Mr. Justice A'Beckett. It has seemed right to both the Courts below that the costs of all parties to the litigation should be paid out of the testator's estate, those of the plaintiffs, who are the executors, being taxed as between solicitor and client. Their Lordships have been asked to follow the same course in disposing of the costs of this appeal; and the residuary legatees raise no objection. Their Lordships will order accordingly.

Solicitors for the appellants: *Speechly & Co.*
Solicitors for the Melbourne Hospital: *Anderson & Sons.*
Solicitors for the executors: *Phelps, Sidgwick, & Biddle.*

[PRIVY COUNCIL.]

J. C.* 1894] Dec. 18.

ZELMA GOLD MINING COMPANY, LIMITED . . . . . } PLAINTIFF;

AND

HOSKINS AND ANOTHER . . . . . DEFENDANTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Law of New South Wales—Arbitration—Reference of Suit against a Company —37 Vict. No. 19, s. 113—55 Vict. No. 32, s. 12.

Held, that the arbitration provisions in the Companies Act (37 Vict. No. 19), only apply to voluntary arbitrations to which a company has submitted by writing under its common seal, not to references under sect. 12 of the Arbitration Act, 1892.

Accordingly, an arbitrator under the later Act need not make the declaration before a justice prescribed by sect. 113 of the earlier Act.

APPEAL from a decree of the Supreme Court (Nov. 8, 1893) setting aside the award of an arbitrator under a reference ordered in an action under sect. 12 of the Colonial Arbitration Act, 1892, on the ground that the arbitrator had not made the declaration specified in sect. 113 of the Companies Act (37 Vict. No. 19).

The facts are stated in the judgment of their Lordships.

F. Vaughan Hawkins (*Cozens-Hardy*, Q.C., with him), for the appellant.

Bigham, Q.C., and *C. C. Scott*, for the respondents.

The judgment of their Lordships was delivered by

THE LORD CHANCELLOR:—

The Appellants are a company incorporated under the Companies Act of 1874 (37 Vict. No. 19). On the 14th of April, 1893, they commenced an action against the respondents, claiming

* *Present*:—THE LORD CHANCELLOR, LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, and LORD SHAND.

to recover damages for breach of a contract to supply water-tight pipes to their mine. The action was pending for trial, when, on the 13th of July, 1893, an order was made by the Chief Justice, under the 12th section of the Arbitration Act of 1892 (55 Vict. No. 32), referring the issues in the action to Mr. Henry Skinner Forsyth as arbitrator. The arbitrator heard the case for several days, and on the 18th of August, 1893, made his award, whereby he directed the respondents to pay to the appellants the sum of £965. The appellants being about to move to enter judgment, the respondents on the 26th of August obtained from the Court a rule nisi calling upon the appellants to shew cause why the award should not be set aside, on the ground that the arbitrator had not, before entering on the reference, made a declaration before a justice, as required by sect. 113 of the Companies Act of 1874. The rule was argued before Innes J. and Stephens J. Innes J. was of opinion that the rule should be made absolute. Stephens J. concurred, though not without hesitation.

The 12th section of the Arbitration Act, 1892, empowers "the Court or a judge, in any cause or matter (other than a criminal proceeding by the Crown) . . . to order the whole cause or matter, or any question or issue of fact arising therein, to be tried before an arbitrator agreed upon by the parties, or before a referee appointed by the Court or a judge for the purpose," in the following cases, "(*a*) if all the parties interested who are not under disability consent; (*b*) if the cause or matter requires any prolonged examination of documents or any scientific or local investigation which cannot in the opinion of the Court or a judge conveniently be made before a jury or conducted by the Court through its ordinary officers; (*c*) if the question in dispute consists wholly or in part of matters of account." The order in question was made under the first of those provisions, all the parties interested consenting.

The question to be determined is, whether in such a case as this the provisions of the Companies Act, 1874, are applicable, so as to require that the arbitrator before entering upon his duties should make the declaration prescribed by the 113th section of that Act. The 102nd section of the Act empowers any company "by writing under its common seal" to agree to

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refer any difference to arbitration. The 103rd section provides as follows: "Whenever any dispute authorized by this Act to be referred to arbitration shall have been in manner hereinbefore provided agreed to be so referred, and wherever any dispute directed by this Act to be so referred shall have arisen, then except where and so far as the parties to such reference shall otherwise agree or provide such arbitration shall be conducted in the manner, and shall have the effect hereinafter provided." The Act then prescribes the manner in which the arbitration is to be conducted, provided the parties have not otherwise agreed. Then comes the 113th section, which is in the following terms: "Before any arbitrator or umpire shall enter into the consideration of any matters referred to him, he shall, in the presence of a justice make and subscribe the following declaration (that is to say): 'I, A. B. do solemnly and sincerely declare that I will faithfully and honestly and to the best of my skill and ability hear and determine the matters referred to me under the provisions of the Companies Act.'" This is the declaration which, according to the contention of the respondents, the arbitrator ought to have made in the present case.

But the first observation which arises is, that such a declaration is in terms inapplicable to an arbitration under the 12th section of the Arbitration Act. The arbitration provided for by the Companies Act is a voluntary arbitration, in which, according to the terms of the 102nd section, there is a submission by the company, by writing under its common seal. In the present case there was no such submission, and the 103rd section, which has reference only to disputes "in manner hereinbefore provided" agreed to be referred, consequently does not apply, with the result that the 113th section is also inapplicable.

The reference in question was a reference of an action, or of issues in an action, then pending in Court. It was really a substitute for the trial of the action. It has been contended by counsel for the respondents that sub-sect. (*a*) of the 12th section of the Arbitration Act is not applicable to the case of an action where a company is one of the parties, and that such an action can only be referred if the company make a submission under their seal. The learned counsel felt a difficulty in contending

that sub-sects. (*b*) and (*c*) were inapplicable to companies, and he confined his contention to sub-sect. (*a*). But there seems to be no more foundation for the contention that the submission must be under seal in the case of the first provision than in the case of the other two. It has never been regarded as necessary, where the consent of a company in a legal proceeding, or in a step in a legal proceeding, is necessary, that such consent should be by a document under seal. Those who represent the company in an action may, for the purpose of a provision of this kind, give the consent as effectually as if it were given by an instrument under seal. The 12th section of the Arbitration Act is, in their Lordships' opinion, as applicable to an action, one of the parties to which is a company, as it is to any other action. Therefore that point, which was not apparently taken in the Court below, does not appear to their Lordships to have any solid foundation.

Stress was laid by the learned judges below upon the provisions of the 24th section of the Arbitration Act, which enacts that the Arbitration Act shall apply to every arbitration under any Act passed before or after the commencement of that Act as if the arbitration were pursuant to a submission, "except in so far as this Act is inconsistent with the Act regulating the arbitration, or with any rules or procedure authorized or recognised by that Act." But the only effect of that section is to apply the arbitration provisions to arbitrations under any other Act, as, for example, arbitrations under the Companies Act, except so far as the arbitrations under those Acts are conducted pursuant to statutory provisions inconsistent with the provisions of the Arbitration Act. Its effect is in no way to introduce into arbitrations under the Arbitration Act any of the provisions for arbitration contained in any of the other Acts, such as the Companies Act.

The only authority referred to, which was one regarded by Innes J. as governing this case, was the case of the *Trades and Industrial Institute* v. *Murray and Lenchan* (1), decided by the Supreme Court in 1890. That was a case where a company and two individuals entered into a contract, one of the conditions

(1) 11 N. S. W. L. R. 36.

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of which provided for the reference of any difference to arbitration. A dispute having arisen, a submission to arbitration was made and an award followed. The award was set aside by the Court, on the ground that the arbitrator had not subscribed the declaration required by the 113th section of the Companies Act. But the present case seems to their Lordships to be a totally different one, inasmuch as the reference does not depend upon the submission of the company, but upon the order of the judge referring the action. Although the consent of the company may have been a necessary condition to that order being made, when once it was made it was the order of the judge which was the foundation of the arbitration proceedings, and not the submission by the parties.

For these reasons their Lordships are of opinion that the rule absolute should be set aside, and the rule nisi discharged, with costs, and they will so advise Her Majesty. The respondents must pay the costs of this appeal.

Solicitors for the appellants: *Want & Co.*
Solicitors for the respondents: *Snow, Snow, & Fox.*

[PRIVY COUNCIL.]

J. C.* 1894 *July* 19, 20; *Nov.* 24.

LAUGHTON . . . . . PLAINTIFF;

AND

GRIFFIN AND OTHERS . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NATAL.

Law of Natal—Speculative Transactions in Shares—Anonymous Associations or Syndicates.

The law of Natal does not render it illegal for any person or association to buy and sell shares as a speculation.

Where an association formed for that purpose, including the appellant, bought from and sold to other associations of which the appellant was not a member, though some of his associates were:—

Held, that such dealings by the appellant's association, even though disadvantageous to the appellant as compared with his associates or some

* *Present:*—THE EARL OF SELBORNE, LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, and LORD MORRIS.

of them, was not necessarily beyond the authority of its manager; which authority, having regard to the nature of the enterprise and to the understanding between the parties as implied from the course of business, was not limited to transactions in the open market.

APPEAL from a decision of the Supreme Court (May 18, 1893).

The case relates to the rights of partners in anonymous partnerships or syndicates for speculative transactions in shares. The question was whether some of the partners can purchase the shares of their syndicate on their own account, or on behalf of other syndicates of which they are members. Similarly with respect to sales to the association by some of its members, on their own account or on account of other syndicates to which they belong.

The facts were not in dispute, and are stated in the judgment of their Lordships.

The Supreme Court dismissed the suit on the ground that the appellant had not made out any case for relief; one of the judges, Turnbull J. being further of opinion that the transactions were gambling transactions, and therefore illegal by the Dutch law.

Gore, for the appellant, contended that the appellant was entitled to an account of the dealings of the association to which he belonged, and which was of the nature of a partnership. All transfers of shares to and from the association in suit in respect of sales to or purchases from other syndicates in which the respondents or any of them were interested were, as against the appellant, who was ignorant thereof, wrongful. The respondents were bound to account for any profits derived by them from such transfers, on the basis of debiting the respondents with the profits made by such other syndicates, or which might have been made if the transferred shares had not been retained by such syndicates. Reference was made to *Bentley* v. *Craven* (1); Digest, bk. xvii. tit. 2, art. 74; *Beningfield* v. *Baxter* (2); *Shallcross* v. *Oldham* (3); Story on Agency, 7th ed. par. 210.

(1) 18 Beav. 75.
(2) 12 App. Cas. 167, 179.
(3) 2 J. & H. 609.

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Israel Davis, for the respondents, contended that the affairs of the association in suit had been conducted in the usual course of business, which was well known to the appellant, and was without fraud. Assuming the association to have been a partnership, it was an anonymous partnership in the nature of a corporation, and distinct from the individuals composing it. Having regard to its nature and the understanding between its members, it was entitled to deal with its own members and with other partnerships or *quasi* corporations, however composed. The appellant was not entitled by the law of Holland to the relief which he sought. Reference was made to Van der Linden (Juta's translation), bk. 4, c. 1, s. 11; Pothier on Partnership, par. 61 (p. 42 of English translation). [LORD WATSON referred to *Blaine* v. *Holland* (1).] *Watermeyer* v. *Kerdel's Trustees* (2). Reference was also made to Grotius (Herbert's translation), bk. 3, c. 3, ss. 48, 49, and to *Scott* v. *Brown* (3).

Gore, replied.

1894 *Nov.* 24.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN:—

This is an appeal from a judgment of the Supreme Court of Natal, dismissing an action in which the appellant was plaintiff. The appellant, who is a solicitor and advocate in the Colony of Natal, was a member of an association formed there in December, 1888, for the purpose of buying and selling gold-mining shares as a speculation. By his declaration he claimed relief in respect of certain dealings and transactions on account of the association in which he alleged that he had been treated unfairly. The members of the association, or syndicate as it seems to be the fashion to call an association of this sort, were nine in number—the appellant, the six respondents who were defendants in the Court below, and two persons who for some reason or other were not made parties to the action.

Gold-mining at the time was all the rage in Natal. Speculation in mining shares was rife and rather wild. "Booms," when

(1) Wheeler's Privy Council, 550. (2) 3 Menzies, 424.
(3) [1892] 2 Q. B. 724.

people flocked to buy, alternated with periods of depression, or "slumps" as they were termed, when everybody was in a hurry to sell. Booms themselves, according to the evidence, had their "ups and downs." In the fluctuations of the market there was money to be made by those who were more or less behind the scenes, and who were not too nice or too scrupulous to take advantage of the greed and folly of the public.

The syndicate which was the subject of the action was known as No. 4 Syndicate. It was apparently the first enterprise of the kind in which the appellant was concerned. The other members, with one exception, had all been engaged more or less deeply in a series of ventures of the same description, some of which had been wound up already, leaving a good profit, while others were still running with every prospect of a similar result.

The first of the series was a venture in which the only persons concerned were the respondents W. H. Griffin and H. Bale. Mr. Bale was a solicitor in Maritzburg. Mr. W. H. Griffin was a general merchant and storekeeper there, and he was also a leading broker and secretary to several gold-mining companies. "His office," as one of the witnesses says, "was a busy centre for gold transactions." In the next venture a share was taken by the respondent, Henry Griffin, the father of Mr. W. H. Griffin, who is said to have been the most successful floater of companies in the Colony. By degrees the syndicates were extended. New members came in, and the money at stake was increased. "My transactions with all these syndicates," says Mr. W. H. Griffin, speaking of the time when No. 4 Syndicate was started, "were very large indeed. In December, 1888, we had transactions to £212,000. The effect of my transactions on the market would often depress or lift the market as I desired."

The mode of operation was the same throughout. The funds required were obtained by way of overdraft from a bank on the joint and several guarantee of the persons who had agreed to be members. The overdraft was in favour of Mr. W. H. Griffin in every case. No formal agreement was made between the members. It was understood that profits and losses were to be shared equally. But there was nothing in writing except the guarantee to the bank. The operations of the syndicate were

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left in the hands of Mr. W. H. Griffin, aided by such suggestions as might be made from time to time by any of the other members. There were no minutes kept. There were no regular meetings of the members. The only record of what was done was to be found in the books of Mr. W. H. Griffin. He bought and sold for each and all of the syndicates, and managed their affairs as he thought best. At the same time he and the other members of any particular syndicate were perfectly free to deal in the very shares in which the syndicate was trafficking, and to buy and sell as they pleased on their own private account without regard to the interests of their associates.

No. 4 Syndicate was formed on precisely the same lines as those which preceded it. At the outset, however, it was intended that a committee of management should be appointed. It appears that at an informal meeting of some of the members it was proposed that the respondent Parker should take charge, subject to Mr. Bale's supervision. Mr. W. H. Griffin seems to have been under the impression that this arrangement was carried out, and he asserts that in consequence he did not personally take any part in the management of No. 4. Mr. Parker and Mr. Bale both allege that they refused to take upon themselves the management of the syndicate, though Mr. Parker at the beginning appears to have had more to do with its affairs than any of the other members. As a matter of fact, the syndicate was managed in Mr. W. H. Griffin's office, and the purchases and sales on its account were made at first by a Mr. Brown, who was Mr. W. H. Griffin's clerk and a licensed broker, and afterwards by Mr. Blumlein, who succeeded him and held the same position in the office. During a considerable part of the period covered by No. 4 Syndicate Mr. W. H. Griffin was in England.

The appellant was brought into No. 4 through Mr. Bale, who was an intimate friend of his. Mr. Bale told him about these syndicate speculations and the profits to be made by the business. He was taken with the idea, and begged to be allowed to join in the next venture. Accordingly, when No. 4 was projected, Mr. Bale put his name down and got him accepted as a member, in spite of no little opposition on the part of some of the associates and some objection on the part of the bank. The

appellant was content to take his place with the rest. He made no inquiries. He made no stipulations of any kind. He had no communication with any one except Mr. Bale on the subject of the syndicate. When he was admitted he joined in signing a guarantee to the Standard Bank for £15,000. But he took no active part, and apparently very little interest, in the practical work of the syndicate. Indeed, his hands were pretty full at the time. Besides his professional engagements, whatever they were, he was a busy man. He speculated largely in mining shares. He conducted a syndicate himself at Johannesburg in conjunction with a large number of Maritzburg people until it was stopped by a "slump," and he was local director of at least two gold-mining companies. In the early days of the syndicate he once asked Mr. Bale how the syndicate was going on. He was told that the members were each about £1000 to the good. "I rested quite satisfied," he says, "and mentally placed to my credit £1000." Afterwards he was called upon to sign an additional guarantee for £5000, in consequence of over-speculation on the part of the syndicate. He signed the document with some grumbling. Then, in April, 1890, at Mr. Bale's request, he joined in a formal application to the bank to release the respondent Parker from his guarantee on payment by him to the bank of the sum of £384 4*s.* 11*d.*, being his share of the syndicate liability to the bank at that time. Matters drifted on till May following, when the manager of the bank pressed for re-payment of the guaranteed overdraft. The accounts were made up. The appellant was informed that his proportion of the loss was £272 9*s.* 6*d.*, against which there stood to his credit certain shares, apparently of little or no value. The other members paid up their quota. The appellant refused to pay until he had seen the accounts. The accounts were shewn to him after some delay and demur on the part of Mr. W. H. Griffin, and then he insisted upon overhauling them, and having every voucher produced. The bank manager was urgent. To avoid trouble and the worry of litigation, the other members who were liable to the bank thought it best to make up the appellant's share among themselves and say no more about it. They imagined that that would be an end of the matter. He took their action amiss,

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supposing that there was something behind, and so he persuaded himself that instead of his being a debtor to the syndicate the syndicate was a debtor to him.

Then followed some correspondence, and attempts were made to bring about a settlement. Ultimately, in November, 1892, after Mr. W. H. Griffin's books had been investigated by an accountant on the appellant's behalf, the appellant commenced his action against the respondents. He claimed £1750 as due to him. In the event of his not being held entitled to relief in that form, he asked that accounts might be taken between himself and the respondents with consequential relief.

The action came on to be tried before the Supreme Court in March, 1893. The trial lasted fourteen days. All the members of the syndicate were examined and cross-examined at great length, with the exception of a Mr. Ryan, who does not seem to have taken any part either in the operations of the syndicate or in the subsequent disputes. All the accounts in the books of Mr. W. H. Griffin relating to the affairs of the syndicate were minutely investigated with the assistance of accountants on both sides. The Court, consisting of Gallwey C.J., Wragg J., and Turnbull J., were unanimously of opinion that the appellant had not made out any case of fraud or unfair dealing as far as he was concerned on the part of the respondents or any of them. The Chief Justice and Wragg J. were of opinion that the appellant was not entitled to any relief upon the merits. Turnbull, J., differing in this respect from the rest of the Court, held that the members of the syndicate had been engaged in an enterprise savouring of illegality. His view was that that objection was sufficient to disentitle the appellant to relief, and he based his judgment on that ground.

Whatever may be thought of the objects of the syndicate, or the means by which those objects were pursued, their Lordships are unable to accept the view taken by Turnbull, J. It does not appear to their Lordships that there is anything in the law of the Colony which makes it illegal for any person, or for any body of persons, to buy shares with the view of selling them again and making a profit by the transaction.

As their Lordships agree in the conclusion at which the

Supreme Court arrived, that the appellant has failed to establish any case of fraud or unfair dealing on the part of Mr. W. H. Griffin or any of the other members of the syndicate, it will only be necessary to refer very briefly to the principal objections which were taken to the accounts.

The first objection was that Mr. W. H. Griffin ought not to have been allowed brokerage. But as Wragg J. observes, it would seem absurd to expect that Mr. W. H. Griffin should give his associates the benefit of his skill and employ a broker and keep all the accounts of the syndicate in his office without some remuneration. It seems that from the first brokerage was charged in all these syndicates, and everybody, or everybody except the appellant, understood it.

The next point was this. No. 4 Syndicate when it was first started over-purchased largely. It bought a quantity of shares called "Nigels" for which it had not the money to pay. The bank guarantee was extended. But that was not sufficient. So certain members of the syndicate, the only members who took the trouble to attend to its affairs, thought it best to transfer to another syndicate the shares bought in excess. They were transferred at cost price, and No. 4 Syndicate was thus relieved of the difficulty in which it was placed without any payment or any loss whatever. It is tolerably clear that if these shares had been thrown upon the market suddenly the loss would have been considerable. It turned out that while they were in the hands of the transferees they improved in value. The appellants sought to charge the respondents with this improved value. Their Lordships agree with the Supreme Court in thinking the claim not well founded.

Then there was a loan of £2000 from No. 4 Syndicate to one of the other syndicates to which exception was taken. No doubt that was an improper transaction. But as the money was repaid with interest exceeding the amount which the bank was charging for interest it is difficult to see what the appellant has to complain of.

The chief objection on which Mr. Gore insisted in his very able argument was that No. 4 Syndicate bought from and sold to other syndicates in which Mr. W. H. Griffin and some but

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not all the other members of No. 4 were interested. It was not contended that this was done with the deliberate intention of throwing an undue proportion of loss on the appellant or giving an undue proportion of gain to the other members of the syndicate. But it was said that this result was the necessary consequence of the appellant's position, and that, having regard to the fact that he was interested only in No. 4, all the dealings of that syndicate ought to have been in the open market, or at any rate with outsiders only. It is not clear upon the evidence what the actual result of the dealings between the syndicates was. But, assuming that it was disadvantageous to the appellant and advantageous to some of the other members of No. 4, their Lordships are not prepared to hold that under the circumstances of this case the appellant is entitled to relief on this head. Having regard to the nature of the enterprise in which the appellant was concerned and the knowledge which must be imputed to him and his co-adventurers, their Lordships do not think that the transactions in question were beyond the scope of the authority which must be taken to have been committed to Mr. W. H. Griffin as manager and plenipotentiary.

There is one other point which calls for observation. There are some instances in which it appears from the accounts that No. 4 Syndicate bought from and sold to a so-called syndicate described as "Princess Syndicate." In reality this was not a syndicate at all, but a mere entry in the books made by Mr. Blumlein during Mr. W. H. Griffin's absence in England and intended to designate certain accounts in which Mr. W. H. Griffin was alone interested. The Supreme Court dealt with this matter perhaps rather lightly. They held Mr. W. H. Griffin not responsible for it because it was done in his absence and without his cognizance. But it seems to their Lordships to be clear that such a transaction, whether done by Mr. W. H. Griffin himself or by his clerk in his absence and without his knowledge, could not possibly stand if it were challenged by a person having an interest in challenging it. Looking, however, at the amount involved in these transactions, it is evident that the proportion which on the most favourable view would be credited to the appellant must fall considerably short of the

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sum with which he was charged as his share of the general loss, and consequently, as he has not paid his quota, there would be nothing coming to him if the account were opened.

On the whole, therefore, their Lordships are of opinion that the Supreme Court was right in refusing any relief to the appellant. The appellant failed to make out a case to the specific relief claimed by him in his action or to any part of that relief. In their Lordships' opinion, after the accounts had been so thoroughly investigated in open Court it would have been idle to have granted a decree for an account even if the action had been properly framed for that purpose.

Their Lordships will, therefore, humbly advise Her Majesty that the appeal ought to be dismissed with costs.

Solicitors for appellant: *Harrison & Powell.*
Solicitors for respondents: *Atkinson & Dresser.*

[PRIVY COUNCIL.]

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THE COUNTRY ESTATES COMPANY, LIMITED . . . . . } DEFENDANT;

AND

GRAVES . . . . . PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Law of Victoria—Land Tax Acts—Purchaser of Lot less than 640 *Acres—Vendor's Claim to Proportionate Land Tax.*

Where the respondent had contracted to purchase from the appellants less than the 640 acres which is the minimum quantity of land liable to land tax under the Land Tax Act, 1877:—

Held, that the appellants were not entitled on completion to charge the respondent with the land tax thereon from the date of his possession, either as his proportionate part of the tax paid by themselves on their entire holding, or as an outgoing contracted to be paid for in respect of his purchase.

APPEAL from a decree of the Supreme Court (Oct. 13, 1891), affirming a decree of Webb J. (March 12, 1891).

* *Present*:—THE LORD CHANCELLOR, LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, and LORD SHAND.

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The suit was for specific performance of a contract for the sale to the plaintiff of a lot of land, of an area less than 640 acres; and was brought to determine whether the purchaser was chargeable with land tax as between himself and his vendors.

Certain trustees were the registered owners on the Land Tax Register of an estate called the Smeaton Estate, and paid the land tax on the entire estate. The appellants were purchasers of a considerable portion thereof, and recouped to the trustees their share of the tax. The respondent took possession of his lot on the 17th of March, 1888. The proportion of land tax paid to the trustees attributable to the respondent's lot was £32 17s., from the 17th of March, 1888, to the 17th of March, 1891, when the suit was tried.

The case in the Courts below, which decided in favour of the respondent, is reported in 17 Vict. L. R. 117, 712.

Crackanthorpe, Q.C., and *Ford*, for the appellants, contended that the appellants were entitled to be indemnified in respect of their payment of land tax, so far as it was attributable to the respondent's purchase. They had been compelled to pay on their entire holding after the 17th of March, 1888, as well as before, by reason of the respondent's lot not having been severed from the entire estate. The appellants had never been rated directly to land tax, the legal estate not being in them. Such legal estate was got in from the trustees from time to time as sub-sales were effected, the trustees joining in the conveyance to the sub-purchaser. Consequently, the land tax had to be paid by them until completion, and under the circumstances it was a payment on the respondent's behalf. As between themselves and the respondent they were entitled to be recouped, partly because it was a payment made in his interest and on behalf of his land, and partly because the contract provided that "all rates and other outgoings shall be adjusted as usual." Reference was made to *Midgley* v. *Coppock*. (1)

The respondent did not appear.

(1) 4 Ex. D. 309.

1894. Dec. 14. The judgment of their Lordships was delivered by

LORD MACNAGHTEN:—

This appeal has been argued before their Lordships ex parte. By the Land Tax Act, 1877, which is now replaced by the Land Tax Act, 1890, a land tax was imposed on owners of landed estates in Victoria of upwards of 640 acres in extent: the owner of an estate of less than that quantity is not liable to land tax.

It seems that the trustees of one John Hepburn were the owners of a large property in Victoria, and were entered on the Land Tax Register in respect of it. The appellants contracted to buy about 2000 acres of the property from them, with the view of reselling in lots. They agreed to sell one lot of about 292 acres to the respondent. They therefore agreed to sell and the respondent agreed to buy a parcel of land, to the ownership of which no liability to land tax attached. The contract between the appellants and the respondent was dated the 14th of December, 1887. Possession was to be given on the 17th of March, 1888, from which date interest was to run. A deposit was paid down, and the balance was payable when the title was "procurable." The contract states on the face of it that the property—that is, the property offered for sale in lots—was being brought under the provisions of the Transfer of Land Statute, and that the vendors guaranteed the issue of a clean certificate of title. There was also a provision that "all rates and other outgoings" should "be adjusted as usual."

On the 17th of June, 1890, the appellants gave the respondent notice that they were ready to settle, but they refused to complete unless the respondent would consent to bear a proportionate part of the land tax which Hepburn's trustees had paid, and in respect of which under some arrangement, the particulars of which are not stated, the appellants had agreed to indemnify Hepburn's trustees so far as the payment was attributable to the property which they had contracted to buy. The respondent refused to submit to the appellants' demand, and this suit was then brought to try the question. The Court of First Instance

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and the Full Court have both decided against the appellants. Their Lordships think the decision perfectly correct.

The claim of the appellants was originally presented in two ways. In the first place, it was put on general principles. This ground seems to be neither more nor less than a vague notion that the payment was one in which the respondent was somehow or other interested. When the circumstances are examined it is plain that the payment by the appellants was made, either for their own benefit, or in pursuance of an obligation which they had undertaken and which they had not transferred either in whole or part to the respondent. It was not made in any sense at the request of the respondent or on his behalf. This ground was abandoned during the argument. The appellants were then forced to fall back on the provision in the contract with respect to outgoings. But the outgoings there mentioned are outgoings in respect of the property contracted to be purchased, not in respect of the larger property of which, in the hands of the vendors, it formed part. They are outgoings which would enure to the benefit of the purchaser when he became owner; not outgoings the benefit of which and the liability to which would be necessarily determined when once the purchase was completed.

Their Lordships will therefore humbly advise Her Majesty that this appeal should be dismissed.

Solicitor for the appellants: *J. Harwood.*

[HOUSE OF LORDS.]

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THE ASSESSMENT COMMITTEE OF THE HOLYWELL UNION AND THE CHURCHWARDENS AND OVERSEERS OF THE PARISH OF HALKYN . . } APPELLANTS;

AND

THE HALKYN DISTRICT MINES DRAINAGE COMPANY . . . . . } RESPONDENTS.

Poor-rate—Rateable Occupation—Easement—Tunnel—Occupation not Exclusive, but Paramount.

Land may be occupied for the purpose of and in connection with the enjoyment of an easement in such a manner as to make the person so occupying rateable to the relief of the poor. Such a person may be rateable, though his occupation is exclusive only for certain purposes, and though the owner of the soil has reserved to himself rights of possession subordinate to the paramount right granted to the other. The test of rateability is not whether the rights granted are corporeal or incorporeal, but whether there is an occupation—which is a question of fact.

Where in pursuance of a statute the owner of land granted to a drainage company the exclusive right of drainage through a tunnel and a water-course in his land, with the right of placing works in the tunnel and water-course, and of making other tunnels in connection therewith, reserving to himself mineral and other rights:—

Held, reversing the decision of the Court of Appeal, that the statute and grant gave the company not merely an easement but possession of the tunnels and water-course, that the rights reserved to the owner were subordinate to the rights granted to the company, and that the company were de facto in occupation of the tunnels and water-course and rateable to the poor in respect thereof.

APPEAL from an order of the Court of Appeal (1) upon a case stated by Quarter Sessions for the opinion of the Queen's Bench Division.

By an Act of 1875 (38 Vict. c. lviii.) the Halkyn District Mines Drainage Company was incorporated. By sect. 6 they were empowered to make and maintain certain tunnels described in the deposited plans and sections, and to enter upon, take, and

(1) Not reported.

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use, or at their option to purchase, and take an easement in, through, over, or under, or right of using such of the lands described as might be required for that purpose. By sect. 7 the company were empowered to purchase or lease a tunnel known as the Halkyn Deep Level, and also an existing open cut or water-course, or an easement in, through, or over, or right of drainage through, or other right of using the same. By sect. 8, in the event of the company acquiring the Halkyn Deep Level and existing cut, or any such easement or right, power was given to cleanse, deepen, widen, straighten, enlarge, divert, and improve the same.

On the 14th of December 1882 a deed of grant was made by the Duke of Westminster to the Halkyn District Mines Drainage Company with the view of carrying out the object of the Act. The terms of the grant are stated in the judgment of Lord Herschell L.C.

Whilst the negotiations for the deed were proceeding, the company had constructed a portion of the tunnel or level, and since the execution of the deed they had continued the tunnel or level for some distance further. They had also deepened the open cut, and built up the sides of it to prevent the loose ground of the hillside from slipping into it. They had also substantially and permanently repaired the tunnel. In carrying out the works they placed in the tunnel a quantity of iron tubbing of oval shape about five feet high, and, as to part thereof, arched the same over with fire bricks, and in other ways supported the roof. The question for the Court was whether the company were liable to be rated as occupiers of the tunnels and open cut referred to. The Queen's Bench Division (Mathew and Collins JJ.), affirming the decision of the sessions, held that the company were liable to be rated. On appeal this decision was reversed by Lord Esher M.R., Lopes and Kay L.JJ.

1894. Nov. 19, 20, 22. Sir *H. James* Q.C. and *Balfour Browne* Q.C. (*Honoratus Lloyd* with them) for the appellants:—

The Court of Appeal seem to have thought that because the drainage company had by the grant an easement through the tunnel, and were not owners of it, therefore they could not be in

occupation. It is true that they were not owners, and that they had an easement: but they had much more than an easement, namely, exclusive possession or occupation for the purpose of drainage, and the right to erect tubbing, arches, and works, and to divert and enlarge the tunnel. These rights are paramount, and such rights as the grant reserved to the Duke were subordinate to them.

There is as clear an occupation as there was in *Pimlico Tramway Company* v. *Greenwich* (1); or in *Lancashire Telephone Company* v. *Manchester* (2); or in *Rex* v. *Chelsea Waterworks Company* (3); or in *Talargoch Lead Mining Company* v. *St. Asaph* (4). The grantee of an easement may have also an interest in land: *Metropolitan Railway Company* v. *Fowler* (5). *Mayor of Southport* v. *Ormskirk* (6) is really in the appellants' favour: the corporation, having only the right to use the mains for the supply of gas, were held not to be rateable, because they had no possession of the mains, but an easement only.

Badger v. *South Yorkshire Railway and River Dun Company* (7), a case of a towing-path, has no application. Moreover, something short of occupation, a liberty to occupy, may in some cases be rateable.

Sir *R. E. Webster* Q.C. and *Bosanquet* Q.C. (*F. Marshall* Q.C. with them) for the respondents:—

The respondents have not that exclusive occupation which is necessary to rateability and which existed in *Cory* v. *Bristow* (8).

[LORD DAVEY referred to the judgment of Mellish L.J. in *Cory* v. *Bristow* (9).]

An easement, of course, does not prevent there being exclusive occupation in another. The Duke of Westminster is still the owner and rateable as such. Trespass would not lie for entering the tunnel. The tunnel is the Duke's, and he might make a tramway in it, and the respondents have only the right of

(1) L. R. 9 Q. B. 9.
(2) 14 Q. B. D. 267.
(3) 5 B. & Ad. 156.
(4) L. R. 3 Q. B. 478.
(5) [1893] A. C. 416.
(6) [1894] 1 Q. B. 196.
(7) 1 E. & E. 347; 28 L. J. (Q.B.) 118.
(8) 2 App. Cas. 262.
(9) 1 C. P. D. 54, 56.

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passage of water. *Roads* v. *Trumpington* (1) illustrates the difference between a rateable occupation and such an interest as that of the respondents. In that case the person rated had a right to dig for coprolites on another's land, and at the end of a term he was to "yield and deliver up" the land. Here there is nothing beyond a licence or power such as in *Rex* v. *Thomas* (2), *Rex* v. *Aire and Calder Navigation* (3), *Rex* v. *Mersey and Irwell Navigation Company* (4), and *Watkins* v. *Milton-next-Gravesend* (5), were held not to be rateable. The appellants are bound to, but cannot, shew either a passing of ownership from one to another or an exclusive use of the land. If there is a common use, as here, by the owner, licensees and others, the only rateable occupation is that of the owner.

Balfour Browne Q.C. in reply:—

Watkins v. *Milton-next-Gravesend* (5) is practically overruled by *Cory* v. *Bristow* (6).

The House took time for consideration.

Dec. 17. LORD HERSCHELL L.C. (after stating the facts as given above):—

My Lords, the Court of Appeal were of opinion that the effect of the deed was to convey to the respondent company an easement only. If this view be correct, I think there can be no doubt that the conclusion that the respondent company are not rateable necessarily followed. In the Court of Appeal it was, I gather, argued on behalf of the present appellants that the ownership of the tunnel was by the deed of grant conveyed to them. In consequence, probably, of the line of argument adopted, the case appears to have been treated by the learned judges as one in which the only alternative views were ownership or easement. I do not think this is so. No doubt, if it could be shewn that the respondent company were the owners of the tunnel, this would negative the idea of their being entitled merely to an

(1) L. R. 6 Q. B. 56.
(2) 9 B. & C. 114.
(3) 9 B. & C. 820.
(4) 9 B. & C. 95.
(5) L. R. 3 Q. B. 350.
(6) 2 App. Cas. 262.

easement, and being owners they would, primâ facie, be the occupiers; they would be so regarded unless the occupation were shewn to be in some one else. But even if it be established that on the true construction of the deed they are not owners, it does not follow that they were possessed of an easement only and were not occupiers. There may be occupation without even the existence of the relation of tenant towards the owner of the property. And I think land may be occupied for the purpose of and in connection with the enjoyment of an easement in such a manner as to make the person so occupying liable to be rated. I will refer later on to the authorities which appear to me to support this view. I shall now carefully examine the terms of the grant, as I think the decision of this case turns almost entirely upon what were its nature and effect. It grants, first, "all such easements in and through and right of drainage through and other and exclusive rights of using (but subject nevertheless and except and reserving as hereinafter mentioned) the Halkyn Deep Level hereinbefore described and shewn on the said plan by the colours black and pink as may be necessary or convenient for the purposes of the said Act or of the said company's undertaking or any of such purposes together with power from time to time to uphold maintain cleanse repair scour deepen widen straighten alter enlarge divert and improve the said Halkyn Deep Level when and to such extent as may be necessary or convenient for the purposes of the said Act or of the said company's undertaking."

It further grants "full right and liberty at any time and from time to time hereafter to make form construct maintain and exclusively use (but subject nevertheless and except and reserving as hereinafter mentioned) under or through any land within the said area No. 1 of which the said Duke is legal tenant for his own life or of or to which he is seised or entitled for any greater estate tunnels in continuation of or in connection with the said Halkyn Deep Level as now existing and shewn on the said plan by the colours black and pink and the limit of which land towards the south is shewn by a line on the said plan and to make construct execute and do all such works and things as shall be necessary or convenient for that purpose." Then follow

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the words, "and such easements" &c., in precisely the same terms as in the first grant.

It will be seen that both these grants are made subject to, and there is excepted and reserved from them, what is afterwards mentioned. These exceptions and reservations seem to me to throw much light upon the effect of the grant, and upon the question whether all that passed by it to the drainage company was a mere easement.

In the first place, there is excepted and reserved to the Duke "all lead and lead ore which in making or extending the tunnels and works shall be found discovered or gotten."

Next, there is reserved to the Duke and his assigns "the right to use the Halkyn Deep Level and the tunnels to be made as aforesaid for searching for and working the mines and beds of lead lead ore and blende which can conveniently be sought for obtained and gotten by communications with or otherwise by means of the said Halkyn Deep Level and tunnels or any of them respectively or any part or parts thereof respectively and for removing through or by means of the said Halkyn Deep Level and tunnels or any of them respectively or any part or parts thereof respectively and through or by means of any shafts levels and drifts in use by the said company all lead ore and blende which may be so obtained and gotten and all débris and waste materials necessary or convenient to be removed in searching for obtaining and getting such lead lead ore and blende."

If all that was intended to be granted was an easement to allow the drainage water to pass along the tunnels, and the possession of the tunnels remained in the Duke (which is the hypothesis contended for by the respondents), it is difficult to understand how these rights, which the Duke was to have in relation to the tunnels, were treated as exceptions and reservations out of and from the grant to the drainage company, and were conferred upon the Duke in the manner in which they have been by the deed.

And the matter does not stop there, because in a subsequent part of the deed there is a covenant by the drainage company in the following terms: "And also will from time to time and

at all reasonable times permit and suffer the said Duke and his assigns or the owner or owners for the time being of the lands shewn on the said plan of which the said Duke is legal tenant for his own life or of or to which he is seised or entitled for any greater estate and his and their agents and surveyors to go down dial and measure all and every or any of the said Halkyn Deep Level and tunnels and shafts and other works of the said company at all convenient times and for that purpose to make use of all machinery in and about such works he or they not unnecessarily obstructing or interfering with the user of the said level tunnels shafts and works for the purposes of the said company's undertaking or obstructing or hindering further than need shall absolutely require the said company their successors or assigns or their servants in the prosecution of any of their works or operations."

If the company were to have an easement only, and were not to be in possession of the tunnels and works which they constructed, and the Duke was to remain in possession of them, it is difficult to understand why a covenant should be taken to "permit and suffer the Duke to go down dial and measure the tunnels and shafts."

It is true that the first grant confers such exclusive rights of using the level as may be necessary or convenient for the purposes of the Act, but they have power to enlarge and divert the level, and for that purpose to enter upon the Duke's lands which adjoin, or are near to, the level. With regard to the new tunnels, as I have already shewn, in addition to the grant of easements and exclusive rights, full right is given to make and exclusively use the tunnels, subject only to the exception or reservation in the Duke's favour.

The exceptions are followed by a proviso that the rights under the exceptions and reservations hereinbefore contained shall not be used or exercised so as to obstruct, hinder, delay, or interfere with the prosecution by the said company of any works or operations of the said company under the authority of these presents, or for the purposes of the said Act, or of the said company's undertaking, or to the damage, injury, or prejudice of the said level tunnels and shafts, or any other works of the said

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company, or so as to obstruct or interfere with the free flow of water through the said level or any of the tunnels and levels of the said company, or with the user for the purposes of the said Act or of the said company's undertaking of the said level or any of the tunnels, levels, and works of the said company.

And this is not all. It is also provided that the rights under the exceptions and reservations contained in the deed shall not be exercised or exercisable except subject to the provisions of the Act and such bye-laws allowed in manner provided by the Act as shall for the time being be in force. The Act, by sect. 45, makes it unlawful for any person without the written consent of the company first had and obtained, and then only subject to such conditions and regulations as should be prescribed by the company, "to make or form any communication to or with the tunnels and levels or other works of the company." So that it is clear that the Duke can have no rights in respect of the tunnels except those expressly reserved to him by agreement in the deed of grant. By sect. 46 of the Act the company are authorized to make bye-laws for the protection of their works and "for preventing the flow, escape, or percolation of water by any means inconsistent with those prescribed or provided by the company."

My Lords, it seems to me clear, therefore, that with regard to these tunnels the rights of the respondents are paramount, and those of the Duke are subordinate to them. Upon a careful consideration of the terms of the deed of grant I am unable to adopt the conclusion that it conferred upon the respondents an easement or rights in the nature of an easement only. I think that it gave them the possession of the tunnels of which they thus have the exclusive use for purposes of drainage, and that such rights as remained in the Duke were only those expressly reserved to him and which were subordinate to those possessed by the company. If the possession thus became theirs, it is quite immaterial to my mind for the present purpose whether they became the owners or not.

Along the tunnel for a considerable distance the company have placed iron tubbing; in parts they have placed brick arches; it seems to me that in these parts they occupy land

precisely in the same sense as a water company does by its pipes or a tramway company by its rails, or a telephone company by the supports for its wires.

As to those parts of the tunnel which are so occupied, I can see no substantial distinction between the present case and those in which it has been held that water companies, tramway companies, and telephone companies are rateable. But even as to the part where there is no tubbing or arches, I think the respondents are in possession. They may at any time place such works in any parts of the tunnel that they please, and, as I have already pointed out, it rests with them not only in the first instance to determine the direction of the tunnel, but at any time they please to divert it and alter its direction. The question whether a person is an occupier or not within the rating law is a question of fact, and does not depend upon legal title. The person legally possessed may not occupy. On the other hand, a person may be occupier either with or without the consent of the owner.

In *Rex* v. *Chelsea Waterworks Company* (1), a water company to whom the Crown granted the right to lay down their pipes were held by the Court of King's Bench to be occupiers of land and liable to be rated.

In the case of the *Pimlico &c. Tramway Company* v. *Assessment Committee of the Greenwich Union* (2), a tramway company was held liable in respect of the occupation of the road by their tramways. They were certainly not the owners of any part of the road; they were merely authorized to lay down the rails thereon. The only right which they possessed was an exclusive right of using those rails by carriages with flanged wheels; the public retained the right to pass over them and use them in any other way. The company were, nevertheless, held liable to be rated.

In the case of *Lancashire and Cheshire Telephone Exchange Company* v. *Overseers of Manchester* (3), a telephone company were held liable to be rated in respect of their wires and poles where the wires were attached to the roofs or walls of houses by

(1) 5 B. & Ad. 156. (2) L. R. 9 Q. B. 9.
(3) 14 Q. B. D. 267.

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the permission of the occupier, who, nevertheless, retained complete control of the building, so that the company could only obtain access to the roof by his permission. Lindley L.J. said (1): "The distinction between an easement of support and the occupation of that which affords support is often very fine. I think the telephone company occupy land in the same sense as many other persons who have been grantees of easements, and have been held rateable."

In the present case, for the reasons I have given, I think that the respondents, and not the Duke, were the occupiers of the tunnels and works for rating purposes.

It was strongly contended, on behalf of the respondents, that they could not be liable to be rated, inasmuch as they were not in exclusive occupation. There are many cases where two persons may, without impropriety, be said to occupy the same land, and the question has sometimes arisen which of them is rateable. Where a person already in possession has given to another possession of a part of his premises, if that possession be not exclusive he does not cease to be liable to the rate, nor does the other become so. A familiar illustration of this occurs in the case of a landlord and his lodger. Both are, in a sense, in occupation, but the occupation of the landlord is paramount, that of the lodger subordinate.

In the present case, in my opinion, on the true construction of the deed, the possession of the respondents is paramount, and any rights which the Duke has are subordinate. The respondents alone have the right of using the tunnels for the primary purpose for which they have been constructed. The Duke has no such right, and, in my opinion, the respondents are in occupation of the tunnels and works.

A question was raised with regard to a tramway which has been laid down along a part of the tunnel for the purpose of carrying minerals and other materials. It is not necessary to consider whether the occupiers of this tramway could be separately rated in respect of it. The fact that its construction and use are permitted does not, in my judgment, prevent the respondents being in occupation of the land.

(1) 14 Q. B. D. at p. 271.

I arrive at the conclusion I have indicated, differing as it does from the Court of Appeal, with the less hesitation, inasmuch as the contention before them appears to have been, on the one side, that an easement only was granted; on the other, that the respondents were owners of the tunnels and works. The view which was presented to your Lordships, that the respondents might be in occupation of the land even though the purpose for which it was to be used was in the nature of an easement, does not appear to have been before them. No reference was made to the works they had actually constructed in the tunnels, or to the cases which I have cited, which seem to me to have so direct a bearing upon the question to be determined.

I think the judgment of the Court of Appeal should be reversed, and the judgment of the Queen's Bench Division restored, and that the respondents should pay the costs here and in the Courts below.

LORD MACNAGHTEN :—

My Lords, if it had not been common ground that the possession of the Halkyn District Mines Drainage Company was in conformity with their documentary title it would, I think, have been more than doubtful whether the Court of Appeal were right in treating the question before them as a question of construction. Liability to rates is not a matter of title. The question in each case must be whether there is in fact such an occupation as, according to the Statute of Elizabeth and a course of decisions which have been recognised and established as law, carries with it liability for rating purposes. In the present case, however, it is not suggested, on the one hand, that the possession of the company is greater, or, on the other hand, that it is in any respect less than the possession authorized by the Act of Parliament and the deed of grant. And therefore I think it is sufficient, as it certainly is convenient, to limit the inquiry to the consideration of the question, what were the rights conferred upon the company, taking for granted that whatever was conferred has been actually enjoyed. But then it is necessary to consider both the Act of Parliament and the deed; and the Act is, I think, not the less important of the two.

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The learned judges of the Court of Appeal, confining their attention to the deed and scarcely noticing the Act of Parliament, have held that nothing passed but a mere easement. If that were the true view, there would be no liability to rates. But I cannot help thinking that the company acquired much more than a mere easement or a mere right of passage for the water which it was their object and their duty to clear off. The Halkyn District Mines Drainage Act, 1875, incorporates the company for the purpose of making and maintaining the tunnels or adit levels and other works therein mentioned, and it expressly authorizes the company to make use and maintain the said tunnels or adit levels with all proper shafts works and conveniences connected therewith, and to enter upon take and use or (at their option) to purchase and take an easement in through over or under or right of using such of the lands delineated on the deposited plans and described in the books of reference as might be required for that purpose.

The Act proceeds to describe the authorized tunnels, one of which was to join an existing tunnel called the Halkyn Deep Level, which communicated with an open cut, or water-course, running into Nant-y-Flint Brook: and it authorizes the company, for the purposes of the Act, to purchase, lease, or otherwise acquire by compulsion or agreement the Halkyn Deep Level and the said open cut, or water-course, "or an easement in through or over or right of drainage through or other right of using the same."

Then follows a section which seems to me to have some bearing on the question before your Lordships: it is sect. 8. It authorizes the company, in the event of their acquiring the Halkyn Deep Level and the said open cut or water-course, or "any such easement or right as aforesaid," from time to time to deepen, widen, alter, divert, and improve the same. It will be observed that the statutory powers of the company in this respect are precisely the same whether they do or do not acquire any proprietary right in the soil.

The same observation applies to other provisions of the Act. Sect. 45 provides that without the written consent of the company, and then only subject to such conditions and regulations

as shall be prescribed by the company, no communication shall be made to or with the tunnels and levels, or other works of the company. Sect. 46 empowers the company to make bye-laws for the protection of their works—for the protection of their rights under the Act, and for preventing the flow of water by any means inconsistent with those prescribed or provided by the company. These provisions are general and not dependent on the acquisition by the company of any proprietary right in the soil.

It is only necessary to add that the Act empowers the company to make extensions to their works on acquiring by agreement such land or such right in, through, or over such land as may be required for the purpose, and that in consideration of their services, the company are authorized to levy certain "royalties" within the drainage district.

The position of the company was therefore defined and assured by the Act subject to their acquiring either such interest in the land, or such rights in, through, or over the land, as might be required for the construction of their works. For all practical purposes the position of the company in regard to their authorized works was to be the same whichever of the two alternatives might be adopted.

Such being the effect of the Act—the company having made some progress with the proposed works—the Duke of Westminster, who was the statutory owner of the land within the drainage area, made a grant to the company on the 14th of December 1882. So far as the present question is concerned, it may be taken that the company did not acquire any proprietary interest in land. Subject to certain reservations, the effect of which will be considered presently, the Duke granted to the company all such easements in and through and right of drainage through and other and exclusive rights of using the Halkyn Deep Level, the open cut or water-course, and any tunnels that might be constructed within the drainage area in continuation of, or in connection with, the Halkyn Deep Level as might be necessary or convenient for the purposes of the Act or of the company's undertaking or any of such purposes.

Now, putting aside for a moment the reservations contained in the deed of grant, can there be any doubt as to the position of

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the company for rating purposes as regards their authorized works? The numerous cases relating to gas companies, water companies, and tramways, place the matter beyond question. To borrow the language of Wightman J., in the case of *Reg.* v. *West Middlesex Waterworks Company* (1), the company are de facto in possession of the space in the soil which their drainage works fill for a purpose beneficial to themselves. It is immaterial here, as it was there, that the company have no proprietary interest in the soil.

I now come to the reservations contained in the deed of grant. They are three in all. First, there is a reservation of certain mineral substances which might be found in the course of making or extending the works. That reservation cannot affect the present question. Then there is a reservation of the use of the drainage works for the purpose of searching for and working mines, and carrying away ore and waste materials. Lastly, there is a reservation of the use of two specified shafts, the use of which had been granted to the company, and any other shafts which might be made or used by the company.

The material reservation is the second. That reservation, if it were unqualified and unlimited as regards the use reserved, might, no doubt, interfere with the operations of the company. But then we find an express proviso and declaration to the effect that the rights under the reservations contained in the deed of grant shall not be used so as to interfere with the operations of the company under the authority of the deed or for the purposes of the Act or of the company's undertaking, or with the user for the purposes of the Act or of the company's undertaking of the drainage works of the company, and that the rights under the reservations contained in the deed shall not be exercised or exercisable except subject to the provisions of the Act and the company's bye-laws for the time being in force.

It is therefore perfectly clear that the rights reserved by the Duke were intended to be and in fact are secondary, inferior, and subordinate to the rights of the company under their Act. If there is any likelihood of a conflict, the rights reserved by the Duke must give way. The rights of the company are paramount.

(1) 1 E. & E. at p. 720.

The company have the sole and exclusive right of using their drainage works so far as those works may be required for the purposes of their undertaking. The deed of grant was not, I think, meant in the slightest degree to derogate from the statutory rights of the company. While it enables the company to avail themselves of those rights, it merely reserves for the use of the Duke certain rights and facilities qualified and limited in such a manner as to prevent the possibility of their ever coming into competition with the statutory rights of the company.

It appears to me that under these circumstances such rights of user as are reserved by the Duke no more negative the occupation of the company for rating purposes than the presence of a lodger interferes with the rateability of the householder.

I am, consequently, of opinion that the company are liable to be rated in respect of their occupation for their drainage works, and that the judgment of the Court of Appeal ought to be reversed.

LORD DAVEY:—

My Lords, it would appear from the judgments delivered by the learned judges in the Court of Appeal that the point to which their attention was directed was whether the drainage company had any right of ownership in the tunnels and water-course in question in the case, or had only an easement or incorporeal right over them, and their decision was against the overseers, the present appellants, on the ground that the company were not owners, but had a mere easement. It may be, as Sir Richard Webster suggested, that the course which the argument had taken before the Court of Appeal is the explanation of the reasons for the judgment taking that form.

My Lords, I agree with the learned judges in the Court of Appeal that the drainage company are not owners of the soil of the tunnels or water-course. But that does not seem to me conclusive on the question of their rateability in respect of their occupation. The right of the company may be an easement or incorporeal right; but the easement may be of such a character as requires the occupation of land for its exercise, and confers upon the company a right to occupy land during its continuance.

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According to a long course of authority, the occupation of land under such circumstances is sufficient for rating purposes, though unaccompanied by ownership of any portion of the soil. The law was thus stated by Wightman J. in *Reg.* v. *West Middlesex Waterworks* (1): "In this case," says the learned judge, "the first question is whether the company are rateable for their mains, which are laid under the surface of the highway, without any freehold or leasehold interest in the soil thereof being vested in the company. We think they are. These mains are fixed capital vested in land. The company is in possession of the mains buried in the soil, and so is de facto in possession of that space in the soil which the mains fill, for a purpose beneficial to itself. The decisions are uniform in holding gas companies to be rateable in respect of their mains, although the occupation of such mains may be de facto merely, and without any legal or equitable estate in the land where the mains lie, by force of some statute."

In one of the earliest cases, *Rex* v. *Chelsea Waterworks Company* (2), the waterworks company were held rateable in respect not only of pipes laid underground, but of a reservoir in the Green Park which had formerly been a pond and was used by the company as part of their works under a revocable licence from the Crown. The same principle has been applied in *Cory* v. *Bristow* (3), in this House, to moorings in the River Thames, maintained there under licence from the Conservators; and in the recent cases of *Pimlico Tramway Company* v. *Greenwich Union* (4) and *Lancashire and Cheshire Telephone Company* v. *Manchester* (5), to a tramway laid on a public road, and telephone wires suspended on the chimneys of buildings in a town.

The question whether the company sought to be rated are owners of the soil may be very material in some cases in determining whether they are in occupation or are merely enjoying the same rights as the general public, or a number of other persons, as was held in *Rex* v. *Mersey and Irwell Navigation Company* (6), and recently in this House in the *Assessment Committee of the Doncaster Union* v. *Manchester, Sheffield, and Lincolnshire*

(1) 1 E. & E. at p. 720.
(2) 5 B. & Ad. 156.
(3) 2 App. Cas. 262.
(4) L. R. 9 Q. B. 9.
(5) 14 Q. B. D. 267.
(6) 9 B. & C. 95.

Railway Company (1). But, after all, the real question is not whether their rights are corporeal or incorporeal, but whether the company is de facto in occupation of some portion of the soil.

I need not state again the facts of this case; but, looking at the description of the works in the special case, I cannot doubt that the company occupy, with their tunnel, the portion of ground in which the tunnel is constructed, and also those portions which are enclosed within the tunnel, and used by the company for the purpose of their undertaking. And I also think with Collins J. that they have a similar occupation of that portion of their works which consists of an open cut or water-course. I am further of opinion, looking at the provisions of the company's Act of Parliament, that such occupation and right of user was necessary for the execution by the company of the purposes of the Act, and I think it was conferred on the company by the deed of grant from the Duke of Westminster.

But then it is said that the occupation is not exclusive, inasmuch as the Duke of Westminster has reserved certain rights to himself and his licensees over the tunnels and water-course, and in pursuance of such reserved rights the Halkyn Mining Company have laid a tramway along one of the tunnels and have placed ventilating pipes there. Two questions arise: What is meant by exclusive occupation when used in connection with the subject of rating? And, What are the conditions subject to which the Duke exercises his reserved rights? It is clear that

(1) In this case the House (Lord Herschell L.C. and Lords Ashbourne and Macnaghten) adopting the construction put upon a similar statute in *Rex* v. *Mersey and Irwell Navigation Company* (9 B. & C. 95), held (July 2 1894), that under two local and personal Acts (12 Geo. 1, c. xxxviii., and 13 Geo. 1, c. xx.), the railway company as successors of the original undertakers were not occupiers of the natural bed of the River Dun but had only an easement therein, and were not rateable to the relief of the poor in respect of the natural bed. Their Lordships held, secondly, adopting the construction put by the Exchequer Chamber upon 12 Geo. 1, c. xxxviii. in *Badger* v. *South Yorkshire Railway and River Dun Company* (1 E. & E. 347; 28 L. J. (Q. B.) 118), that the railway company were not owners of the soil in the towing-path, but had only an easement therein; that they were not shewn to be in fact occupiers of the towing-path, and were, therefore, not rateable to the relief of the poor in respect thereof.

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exclusive occupation does not mean that nobody else has any rights in the premises. The familiar case of landlord and lodger is an illustration. The cases shew that if a person has only a subordinate occupation subject at all times to the control and regulation of another, then that person has not occupation in the strict sense for the purposes of rating, but the rateable occupation re mains in the other, who has the right of regulation and control. This was so held in *Smith* v. *St. Michael, Cambridge* (1), in *North Western Railway Company* v. *Buckmaster* (2), and in the recent case of *Rochdale Canal Company* v. *Brewster*. (3) As I took part in the decision of the latter case in the Court of Appeal I will not repeat what was said in the judgments. See also the judgment of Lord Blackburn in *Cory* v. *Bristow* (4) in the Court of Appeal.

It is necessary in cases of apparent joint occupation to consider what degree of right each party may have in the premises. In the present case your Lordships will find on reference to the deed of grant of the 14th of December 1882 that it purports to grant such exclusive rights of using as may be necessary for the company's statutory purposes, but subject and except and reserving as thereinafter mentioned. On page 47 of the Appendix your Lordships will find the reservation to the Duke. It is (1.) of all lead, ore, or blende ; (2.) the right to use the Halkyn Deep Level and other tunnels for working and removing the reserved minerals ; (3.) a right of user (which is expressed to be subsidiary to the right of user by the company) of any shafts made by the company on payment of a contribution to maintenance and repair ; and the reservation is subject to a proviso that the reserved rights shall not be used so as to interfere with the company's operations, and shall not be exercised except subject to the provisions of the Act, and such bye-laws allowed in manner provided by the Act as shall for the time being be in force.

If your Lordships now turn to the Act you will find that by sect. 45 it is made unlawful for any person without the written consent of the company, and then only subject to such conditions and regulations as shall be made by the company, to make any

(1) 3 E. & E. 383.
(2) L. R. 10 Q. B. 70, 444.
(3) [1894] 2 Q. B. 852.
(4) 1 C. P. D. 54.

communication with the tunnels or levels or other works of the company. And by sect. 46 the company is empowered to make bye-laws for the protection of the works of the company and other purposes.

In these circumstances I have no difficulty in coming to the conclusion that the exercise by the Duke and his tenants and licensees of the rights reserved to them is subordinate to the occupation of the company for the purposes of their undertaking, and does not confer on the Duke's tenants or licensees such an occupation as prevents the occupation of the company being exclusive in the sense in which I have used that expression. Consequently, I am of opinion that the company has a rateable occupation, and that the order of the Court of Appeal should be discharged and the order of the Divisional Court restored.

Order of the Court of Appeal reversed, and order of the Queen's Bench Division restored with costs here and below; Cause remitted to the Queen's Bench Division.

Lords' Journals 17th December 1894.

Solicitors for appellants: *Chappell, Griffith & Broadbridge, for H. G. Roberts, Mold.*

Solicitors for respondents: *Chesters & Co., for Walker, Smith & Way, Chester.*

[HOUSE OF LORDS.]

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THE GUARDIANS OF THE POOR OF THE SCULCOATES UNION IN THE BOROUGH OF KINGSTON-UPON-HULL . . . . . } APPELLANTS;

AND

THE DOCK COMPANY AT KINGSTON-UPON-HULL . . . . . } RESPONDENTS.

THE DOCK COMPANY AT KINGSTON-UPON-HULL . . . . . } APPELLANTS;

AND

THE GUARDIANS OF THE POOR OF THE SCULCOATES UNION IN THE BOROUGH OF KINGSTON-UPON-HULL . . . . . } RESPONDENTS.

Poor Rate—Rateable Value—Docks—Docks in several Parishes—Dock Dues—Assessment, Principle of whether Parochial or Proportional—Dock Railways—Incapacity to charge Tolls—Beneficial Occupation—Annual Value—Hypothetical Tenant (6 & 7 *Will.* 4, *c.* 96), *s.* 1.

In assessing to the poor-rate docks which extend over more than one parish the rateable value should, wherever it is possible, be ascertained by attributing to each parish the receipts earned and the expenses incurred in that parish, and not by obtaining a rateable value for the whole of the docks and then allocating this value to each parish in proportion to the water area of the docks in that parish.

This principle held applicable to the docks at Kingston-upon-Hull, and the decision of the Court of Appeal ([1894] 2 Q. B. 69) affirmed on this point.

Mersey Docks v. *Liverpool* (L. R. 7 Q. B. 643) approved, and *Reg.* v. *Hull Dock Company* (18 Q. B. 325) commented on.

Railway and tramway lines formed part of a dock system, and the dock company were prohibited by statute from taking any tolls for the use of the lines. A tenant could be found who would pay a rent for the lines if such rent could be legally exacted by the dock company:—

Held, that since no rent could be earned by the dock company because of the statutory prohibition, the rent which could have been earned but for that prohibition ought not to be taken into consideration in deter-

mining the rateable value of the dock company's property, and that this was quite consistent with the decision in *London County Council* v. *Churchwardens &c. of Erith* ([1893] A. C. 562, 592).

The decision of the Court of Appeal reversed on this point.

THE dock company at Kingston-upon-Hull having appealed to quarter sessions against an assessment to the poor-rate (made in 1892) of that part of their property which was within the Sculcoates Union, a special case was stated by an arbitrator for the opinion of the Queen's Bench Division, of which the following parts are material to this report.

The dock company constructed several docks at various dates under several local and personal Acts between 1774 and 1883, some of them having been constructed since the decision in *Reg.* v. *Hull Dock Company* (1). Some of the docks communicated directly with each other, others only by crossing the River Humber or the River Hull. One of the docks, the Queen's, was partly within and partly outside the Sculcoates Union, and one dock, the Victoria, was partly in one and partly in another of the parishes composing that union. The third dock, St. Andrew's, was wholly within one parish in the union. The other docks were altogether outside the union. The payment of one set of dock dues entitled a vessel to the use of any of the docks, though for reasons of convenience to shipowners and the dock company particular docks were in practice used for particular trades. A record was kept of all vessels entering the docks and of the particular docks in which they respectively discharged and loaded, and the dock company knew with few exceptions in what parts of the docks parochially they discharged and loaded.

For the purpose of arriving at the rateable value the dock company prepared separate accounts for each of the parishes in the Sculcoates Union, attributing to each parish so far as possible the receipts earned and the expenditure incurred in that parish, in a manner the details of which are set out in the report of the case below (2), but which it is not necessary to repeat here, as this House expressed no opinion with regard to them.

The dock company contended that the rateable value ought not to be apportioned by water area, but ought to be ascertained by

(1) 18 Q. B. 325.

(2) [1894] 2 Q. B. 69.

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attributing to each parish the receipts and expenditure in the way they adopted.

The poor law guardians on the other hand first obtained a rateable value for the whole of the docks, and then allocated this value to each parish in proportion to the water area of the docks in that parish, and contended that theirs was the proper method.

The above portion of the case dealt with the question raised by the original appeal. The following portion dealt with the question raised by the cross-appeal.

On the dock company's estate were railway and tramway lines, belonging to the company, which were used by the North Eastern Railway Company for the traffic between their railway system and the docks. The North Eastern was the only railway system having access to the docks. For this user the railway company paid the dock company £5000 a year for each of the five years ending December 1890. After which time though the user continued the payment ceased. By sect. 53 of one of the dock company's Acts (24 & 25 Vict. c. lxxix.), "The junctions between the dock railways and the Hull and Selby or North Eastern Railway shall be made under the direction and to the reasonable satisfaction of the engineer for the time being of the North Eastern Railway Company and at the expense of the dock company, and no tolls shall be taken by the dock company for the use of those dock railways or of the tramways of the dock company in connection therewith."

The poor law guardians contended that the rent which a tenant might be reasonably expected to give for the railway and tramway lines ought to be taken into consideration in determining the rateable value, having regard to the fact that the North Eastern Railway Company paid a rent until 1891, and discontinued the payment only when introducing into Parliament a bill for amalgamating the dock estate with that of the railway company, and because the dock company had to bear the expense of repairing and maintaining the lines, which expense was one of the outgoings included in the valuation of their property for rating purposes.

The dock company contended that the rent ought to be

excluded from consideration in determining the rateable value, having regard to sect. 53 of 24 & 25 Vict. c. lxxix., and to the fact that no rent had been paid since December 1890.

The arbitrator found as a fact that the North Eastern Railway Company or some other tenant could be found who would pay a rent for the lines, if such rent could be legally exacted by the dock company in view of sect. 53.

The questions for the opinion of the Court were whether the respective contentions of the appellants or the respondents were right.

The Court of Appeal (Lord Halsbury, and Lopes and Kay L.JJ.) held first, varying the decision of the Queen's Bench Division (Mathew and Wright JJ.), that the method adopted by the dock company of ascertaining the rateable value of their property was right, but secondly (by Lopes and Kay L.JJ., Lord Halsbury dissenting), reversing the decision of the Queen's Bench Division, that the rent which a tenant would pay for the railway and tramway lines ought to be taken into consideration for the purpose of arriving at the rateable value, even if such rent could not be legally exacted from the railway company (1).

The poor law guardians appealed against the first part of that decision, and the dock company appealed against the second part.

In the original appeal,

Nov. 22, 23. *Balfour Browne* Q.C. and *R. Cunningham Glen* for the appellants :—

The dock company's method of attributing receipts and expenditure to particular parishes is an arbitrary and fallacious one, and not justified by any findings in the case; it is inconsistent with the fact that the payment of dock dues entitles a vessel to use all the docks. Where a vessel passes through several docks, they all really contribute to the earnings. Each part of the docks is occupied by the company in conjunction with and for the benefit of the other parts, and therefore contributes towards their value. To such a system as this, where

(1) [1894] 2 Q. B. 69.

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the docks form one entire concern, the parochial method cannot be accurately or properly applied, and the dock company themselves were compelled to abandon it, in part at all events, in the case of the Victoria Dock, which is partly in one parish and partly in another. The method is open to manifest abuse: the accounts might be arranged so as to deprive a particular dock of its earnings. The case is governed by *Reg.* v. *Hull Dock Company* (1), where it was held that the poor-rate upon so much of the docks as lay in any parish must be assessed, not according to the actual receipts in that parish, but according to the proportion which the area of docks within that parish bore to the entire area of the docks. The case of *Mersey Docks* v. *Liverpool* (2) was essentially different; there were two distinct and separate sets of docks, which, it was held, ought not to be treated as forming one system. The appellants' principle was accepted in *Reg.* v. *South Staffordshire Waterworks Company* (3) and *North and South Western Junction Railway Company* v. *Brentford Union* (4).

Bosanquet Q.C. and *Marchant* for the respondents were not heard.

In the cross-appeal,

Bosanquet Q.C. and *Marchant* for the appellants:—

The decision of the Court of Appeal seems to be based upon a misunderstanding of the decision in *London County Council* v. *Churchwardens &c. of Erith* (5), and upon a misconstruction of the finding of the arbitrator. His finding clearly implies that if sect. 53 of the 24 & 25 Vict. c. lxxix. prohibits the dock company from taking a rent for the railway and tramway lines a rent could not be obtained. If that statement had been expressly made, instead of being left to inference, the contention of the guardians would have been unarguable, for the Act prohibits the taking of tolls altogether. Money which cannot be earned certainly ought not to be taken into consideration in

(1) 18 Q. B. 325.
(2) L. R. 7 Q. B. 643.
(3) 16 Q. B. D. 359.
(4) 18 Q. B. D. 740, at pp. 754–5.
(5) [1893] A. C. 562.

ascertaining the rateable value. There is nothing in this inconsistent with the decision in the *Erith Case* (1), where such a case as the present is anticipated by Lord Herschell at p. 592. In *Altrincham Union* v. *Cheshire Lines Committee* (2) the railway company was held not to be rateable at a higher sum than the fixed rent, though that rent was much less than the actual value of the traffic. The railway and tram lines are a convenience and attract ships and therefore enable the dock company to earn more than they would if there were no lines, and these additional earnings are taken into account in arriving at the rateable value. The dock company ought not to be rated in respect of these lines on the basis of any profits except those which they enable the company to earn.

Balfour Browne Q.C. and *R. Cunningham Glen* for the respondents:—

The contention of the appellants cannot be reconciled with the decision in the *Erith Case* (1). All the profits which the appellants do or might get ought to be considered. The railway and tramway lines are not by sect. 53 rendered incapable of beneficial occupation, and no restriction is imposed upon the profit-earning capacity of the undertaking. There is nothing to prevent the appellants from granting running powers to other companies and making a large profit. Other railway companies would be willing to pay a large sum for the monopoly enjoyed by the North Eastern Railway Company, and that sum ought to be considered in making the assessment. The decision was right for the reasons given by the majority of the Court of Appeal.

No reply was heard.

LORD HERSCHELL L.C.:—

My Lords, the first appeal raises the question what principle ought to be applied in the assessment of docks belonging to and occupied by the Kingston-upon-Hull Dock Company, which are in different parishes. The dock company are the owners

(1) [1893] A. C. 562. (2) 15 Q. B. D. 597.

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and occupiers of a number of docks. Some of these docks, and some only, are in the appellants' union. The appellants maintain that the proper method of ascertaining the rateable value of the docks in their union is to ascertain what are the earnings of the whole dock system, what is the expenditure necessary to produce those earnings, then, having arrived in that way at the profits earned by the dock company upon the whole of their system, to distribute those profits amongst the different docks in proportion to the water area in the particular parishes. The respondents assert that this is not the proper mode of arriving at the rateable value, that the proper method is to ascertain what are in fact the profits earned by each part of the system, by the particular hereditament in each parish, and that the profits thus earned by the hereditament in the particular parish enable you to arrive at the rateable value.

The only question left to the Court is the choice between those two methods. I say this because some criticisms have been addressed to your Lordships upon the details of the method adopted and contended for on the part of the respondents. I do not think that your Lordships are in a position to deal with such questions as those, because the form in which the case is stated and the question left to the Court only permits a choice between the appellants' method or principle and the respondents' method or principle. If the respondents' method or principle, speaking broadly, be the correct one, then it seems to me to be impossible to give judgment for the appellants, even if there has not been complete accuracy or propriety in the working out of that method. No doubt some of the criticisms upon the method employed by the respondents were properly addressed to your Lordships by the learned counsel for the appellants, because they were designed to shew that it was impossible to arrive at any satisfactory result by the adoption of the respondents' principle or method, and that therefore you were driven to adopt the appellants' principle or method.

My Lords, looking at the matter, apart from any authority, I take certain propositions to be absolutely clear. First, that you are to ascertain the rateable value of a hereditament in a particular parish by ascertaining what that hereditament would let

for in its then condition to a tenant from year to year. There are no doubt cases in which it is impossible to deal with the hereditament found in a particular parish by itself. It is not such as to be capable of being let to anybody by itself; its only value is as part of a system or undertaking. In that case, although, of course, you have to ascertain the rateability of that particular hereditament in that parish, it is impossible for you to arrive at its true rateable value except by regarding the entire system and asking what a tenant from year to year would give for it, considered as a part of that system. Of course, the question what he would give for it from year to year, as a part of that system, involves the consideration of the whole system, and the earnings and profits made by the whole system, and some distribution of them among the various parts which make up that system. But the present case is really not one of that description at all. The question is as to the amount at which certain docks ought to be rated which would have a rateable value if the whole of the rest of the dock system were extinguished to-morrow; they would still be docks, and be capable of being used as docks, and certainly a tenant from year to year would be willing to pay a rent for them as docks. They are capable of being considered, and their rateable value is certainly capable of conception without any reference to the general undertaking, as a part of which, in fact, they are at present used.

What has therefore to be determined is what a tenant from year to year would give for these particular docks; and the parishes are no doubt entitled to insist that in making that inquiry you are dealing with a subject-matter which has an enhanced value by reason of its adaptation to a commercial purpose; that you are not merely to rate it as so many square feet of water or land, but that you are to rate a dock, and the question is what a tenant from year to year would give for that dock. Now, I cannot think that where you have a system of docks of different dimensions, adapted to different purposes, in different local situations (although the distance between them may not be great), they are to be regarded as a homogeneous whole, so that the earnings of the whole if distributed according to the water area will properly give the earnings of every part.

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It does not follow that the larger the dock the greater would be its profit, because you cannot consider the matter independently of all the other considerations to which I have alluded—its adaptability to a particular trade, its local situation, and other circumstances.

It seems to me, therefore, that theoretically the method contended for by the appellants is the wrong one. I quite feel the force of the arguments they have addressed to your Lordships—very able arguments—with a view of shewing that, although it may not be theoretically accurate, it is the best practical measure of the value of a dock in a particular parish. That was the conclusion arrived at by the Court of Queen's Bench in *Reg.* v. *Hull Dock Company* (1); but there all the learned judges admitted that it was not the plan which ought to be adopted if you were able to ascertain what were the earnings of the docks in the particular parishes, that you only resorted to it from necessity because it was not possible to ascertain the earnings of the particular docks and so arrive at their rateable value.

At a later date the case of *Mersey Docks* v. *Liverpool* (2) came before the Courts, and the Court of Queen's Bench, differently constituted no doubt from the Court which decided the *Hull Case* (1), held that the method which had been sanctioned in that case was not to be applied in the case of the Liverpool and Birkenhead docks. The learned judges there came to the conclusion that the method which the Queen's Bench indeed had pronounced theoretically incorrect and had only practically employed because it was impossible otherwise to arrive at the rateable value, was a wrong one; and they considered that there was no real difficulty in arriving at the true result by looking to see what proportion of the dock earnings was attributable to a particular part of their dock system, dependent as that would be upon the amount of traffic which went to one set of docks as compared with another. In the *Hull Case* (1) Lord Campbell, in the course of the argument, suggested that the question would have been the same if the docks had not been altogether on the Humber, but had been some on the Humber and some on the Tyne. That was the very question or the sort

(1) 18 Q. B. 325. (2) L. R. 7 Q. B. 643.

of question which had to be considered in the *Mersey Docks Case* (1). The docks were on the same river, but the river there was a mile broad. But between the *Mersey Docks Case* (1) and the case now before your Lordships I am unable to see the slightest distinction. If we decide this case as the appellants ask us to do, we inevitably overrule the *Mersey Docks Case* (1). My Lords, I am not prepared to do so. I think the decision in the *Mersey Docks Case* (1) was right, and I am quite ready myself to adhere to it in all respects.

It is argued that in the present case the vessels pay the dock company for the use of the whole docks, because they may go into any dock they please; and in many cases they go into more than one dock, namely, into one to load and into another to unload. That is perfectly true; but it seems to me none the less that you do substantially arrive at what is earned at a particular dock by ascertaining what vessels go there, whether it be to load or to unload. No doubt it is perfectly true that if the business of the dock company were so conducted that they purposely diverted traffic into one dock which otherwise would have come, were the convenience of the ship alone considered, into another dock, and so centralized the traffic in one or more docks and denuded the others of it, then the number of vessels loading or unloading in particular docks would no longer indicate the capacity for earning of the various docks. To follow the method adopted by the respondents would no doubt then lead to a wrong result. But there is no such case made here at all. There are no facts found in the case pointing to the conclusion that the distribution of the traffic amongst the docks is regulated by anything else except the convenience of the public and the suitability of the docks to the particular traffic, whether by reason of locality, appliances, or otherwise. Therefore, I see no reason to suppose that the distribution of the traffic is not really, as matters at present stand, an indication of what is the earning capacity of the docks respectively.

That being so, I do not think there is any difficulty in applying the principle which even in the *Hull Case* (2) was said to be the sound principle, if it were capable of application. No doubt you

(1) L. R. 7 Q. B. 643. (2) 18 Q. B. 325.

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cannot arrive at an absolutely accurate result whatever principle you adopt: that I freely admit; you can only at the utmost roughly approximate to it; but I think that you are more likely to approximate to it, and that you can feel confidence that you will approximately reach the true result, by adopting the method contended for by the respondents; whilst, on the other hand, the method contended for by the appellants seems to me to have an inherent vice which will almost inevitably lead you wrong in the great majority of cases, though in a certain number of cases, no doubt, you might thereby reach the same conclusion.

It was said that one of these docks was partly in one parish and partly in another, and that there you were driven to take the water area. I quite agree, and there are some other cases where either the water area or some method of that sort must be applied, because you are dealing with expenditure or receipts which cannot be attributed to a particular part of the system, but which must in some way be spread over the whole.

There is one other point which I ought to notice. It is said that the method employed by the respondents takes no account of the use of some of these docks as means of passage from one dock to another, which is part of the facilities of the docks for which the total payment by a vessel which uses two docks, and a third for the purpose of passing from one to the other, is made. No such point seems to me to be raised in a manner which will enable it to be decided in this case. That is what I have called one of the details connected with the respondents' method of proceeding, but it involves no principle. There is no doubt that in such a case a part of the payment made by the vessel is made for the convenience of passing through the intermediate dock; but, of course, if you were to take from the payment a certain sum in respect of that passage you would diminish pro tanto what would be allotted to the docks in which the ship loaded and unloaded, and it is by no means clear that by omitting this item altogether you do not arrive, having regard to the chances of traffic, at much the same result as you would if you were to take it into account. That depends upon the extent to which the vessels go from one dock to another, and between what docks that traffic flows. But I think it unnecessary to say

more upon that point, because it is not really now before your Lordships. All that this House has at present to do is to decide between two rival methods, and to determine which of them is the correct one. I do not think I need trouble your Lordships further upon this point. For the reasons which I have given I think the judgment appealed from must be affirmed.

My Lords, the point raised in the cross appeal is an entirely different one. Along the wharves of the dock company there run certain tram and railway lines. They are, of course, part of the wharf or dock system, and being in the same occupation have not to be separately rated. The existence of the railway or tram line is simply an incident of the wharf or quay, and its existence is to be taken into account in rating the wharf or quay. You do not rate the piece or strip of land upon which the rails rest separately from the wharf or quay along which they run; it is all one rateable hereditament rated together. Now, of course, in taking into account the earnings of the dock company, the railway accommodation forms one of the elements from which those earnings proceed. But for those railway lines traffic would not come so readily to the docks; ships could not be so readily loaded or discharged, and fewer ships probably would come there. The consequence is that those railway lines no doubt by their existence promote and augment the earnings of the dock. Well, so far their enhancement of the value of the land, that is to say, the increase of value which the wharves have in respect of those lines being upon them, is taken into account and is necessarily involved in the consideration of what the docks are earning.

But it is said that in addition to that these railways might earn for the docks a larger sum, that all the earnings which now flow into their exchequer might be received, and in addition to that something more might be obtained by reason of these lines. No doubt if it could be established that they might earn more than they do, and only earn less because the company choose to forego a sum which they have only to hold out their hands to receive, it might be fairly argued, as the respondents on this appeal have argued, that in considering what was the rateability

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of this property, what a tenant from year to year would give, you were to come to the conclusion that he would give something more than the actual earnings or profits (the surplus of earnings over receipts), inasmuch as he has only to come into occupation to make them greater at his own will. I should not for a moment dissent from that argument if it could be established in point of fact. The fact that the particular occupier chooses to forego a profit which he has only to hold out his hand to receive, of course, cannot exclude that source of profit from consideration when you are asking what a hypothetical tenant would give. But in the present case the only company, so far as appears, that has a junction with these railways, is the North-Eastern Railway Company, and by an Act passed by the Legislature no tolls can be demanded by this dock company for the passage of traffic over their lines. The words are very general.

Now, under these circumstances, the finding by the arbitrator is put in this form: if tolls can legally be exacted, then some money might be received either from the North Eastern Company or from some other tenant. But if tolls cannot be legally exacted, no such sum can be received. Then the question is, supposing that no tolls could be got because they cannot legally be exacted, nevertheless are you to add something to the rating already arrived at, on the ground that the existence of the railway requires some addition? My Lords, I cannot myself think that it is possible, with all deference to those who have thought otherwise, to arrive at any but one conclusion upon the point, and I think that the view of the learned judges in the Court below who have decided in favour of the respondents in this appeal has resulted from a misapprehension of the decision of this House in the *Erith Case* (1). I agree altogether with what Lord Halsbury said on this point in the Court below. We are dealing here with a profit-bearing undertaking. The parishes do not ask that the land shall be valued merely as land, or land covered with water, but they say, "These are docks with wharves, railways, and all these adjuncts and appliances, and it is as docks capable of earning a profit that they ought to be rated. You are to find out what a tenant from year to year in view of

(1) [1893] A. C. 562.

the profits earned would be likely to give, and upon that principle they have been rated." But then it is said, "But they could earn more profits than they are earning, and therefore you ought to suppose that a hypothetical tenant would give more." But if the Legislature have said they shall not earn these suggested further profits because they shall not charge tolls, how can it be established as a matter of fact that they could earn more? It appears to me that if you are to disregard such statutory restrictions as these, you might just as well say that a railway company ought not to be rated only according to the tolls which it receives—ought not to be rated even according to the tolls which it could by law receive within its maximum, but that you ought to disregard its statutory maximum and ask what a tenant from year to year would give for the railway if he could charge any tolls which he pleased.

My Lords, I do not think there is any foundation for such a proposition. It is supposed to be involved in the decision in the *Erith Case* (1). The *Erith Case* (1) and all the cases there dealt with were of a totally different character. They were cases in which the argument had been used that inasmuch as the particular occupier, who was the only person who would give anything considerable for the land, could not make any profit out of it, from the very nature of the circumstances under which the hereditament was employed, therefore either it had no rateable value or in estimating its rateable value you were bound to regard the actual tenant as not being within the category of hypothetical tenants. That was the question raised there, and all that was said about profits and about the land being "struck with sterility" by statute, and so on, was said in relation to a case of that description, where the argument was either that the land was not rateable, or that you were to exclude from amongst the possible tenants the actual occupier. I took care to guard myself, as I thought, in the opinion which I delivered, against being supposed to deal with the class of cases now before your Lordships, because I said (2): "There is no doubt a certain class of cases in which the amount of profit which can be earned by the occupation of a hereditament is very material in ascertaining

(1) [1893] A. C. 562.
(2) [1893] A. C. at p. 592.

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the sum at which it should be assessed. In the case of gas-works, waterworks, and other industrial undertakings, where a hereditament is enhanced in value by its connection with a profit-bearing undertaking, the profits earned and the shares of those profits attributable to any particular hereditament have to be taken into account, and in such cases as these" (that is wherever profits have to be taken into account) "any restrictions which the law has imposed upon the profit-earning capacity of the undertaking must of course be considered."

My Lords, the present case, I agree with Lord Halsbury in thinking, comes exactly within the class of cases which I had in view when I used those words, in which I expressly said that, in my opinion, any restrictions put by the legislature on the profit-earning capacity of the undertaking were to be taken into account. For the reasons which I have given, it is clear that there is no question about taking into account the dock company as one of the hypothetical tenants; there is no question of excluding the dock company because it cannot become a tenant. In the present case the dock company is taken into account, and its earnings are taken into account, in considering hypothetical tenants and what a hypothetical tenant would pay. But the question is whether you are to consider the profits which it might earn if a state of things existed which does not exist, or whether you are to consider the profits which it can earn under the only conditions under which it is allowed to earn profit at all. My Lords, it seems to me that the latter is the state of things which must be taken into account, and that any other course would lead not only to absurdities, but to the gravest injustice as regards the rating imposed. In the *Erith Case* (1) I pointed out that where you came to the conclusion that the actual owner would pay a higher rent than anybody else was likely to pay, even there, taking the owner into account in considering what a hypothetical tenant would give, you were not to fix the amount higher than you thought the owner would pay as tenant.

My Lords, it has been ingeniously pointed out that although it may be that the dock company could not charge tolls to the North Eastern Railway Company, they did in fact receive a sum

(1) [1893] A. C. 562.

of money from them for a considerable time. Well, my Lords, during that time it may be that it ought to have been taken into account. But the case finds that, for a year or two before this question arose, they had not been receiving it, and the question left to us is: What is to be the case where toll cannot be legally exacted?

Then it is further suggested that other railway companies might have running powers over the North Eastern system, who would not be the North Eastern Railway Company, and that the 53rd section of the Act is confined to a prohibition of requiring tolls from the North Eastern Company; that, therefore, tolls could be required from these other companies if they ran over these dock lines, and that, therefore, this is a matter which ought to be taken into account. Well, if all those facts could be established, very likely the contention of the respondents might be well founded. But the question does not really arise here. In order to ascertain whether there were any foundation for it, one would have to see under what circumstances other companies could come over these lines, and one would then have to consider whether, under those circumstances, the prohibition of sect. 53 would apply. But we have not to consider any such point, the only question left upon this part of the case, as I understand it, being whether, supposing the dock company cannot exact tolls, nevertheless you are to take into account as adding to the rateable value the sum which might be obtained by letting this railway.

For these reasons, my Lords, I think that in this case the appeal must be allowed, with the usual result.

LORD MACNAGHTEN:—

My Lords, I concur.

LORD DAVEY:—

My Lords, I agree that the first appeal entirely fails. Speaking for myself, I do not see any great question of principle which is involved in this appeal. What has to be ascertained, in the best way you can, is the rent which a hypothetical tenant from year to year will pay for the rateable hereditament.

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The profits or earnings of the occupier who carries on a valuable business on that hereditament only come in as a measure—a more or less accurate measure—of what you after all have to ascertain, namely, the rent which the premises would command from the hypothetical tenant. But those profits or earnings must be the profits or earnings of the rateable hereditament. It may be that in some cases the profits or earnings of the rateable hereditament are so mixed up with profits derived from the beneficial use of other hereditaments—from trade carried on upon other hereditaments in common with the rateable hereditament—that it is impossible to separate the rateable hereditament, which has no profit-earning value, apart from other hereditaments, and that in those cases it may be proper, as affording the best estimate you can make, to take the profits of the whole undertaking, and then apportion them according to the respective areas of the hereditaments in question, or according to some other principle. But, my Lords, it is obvious that you are only using what has been called in the present case the "water-area principle" as a means of ascertaining the profits or earnings which are attributable to the particular rateable hereditament as having been earned from the beneficial occupation of the rateable hereditament and the trade carried on upon it.

Now, my Lords, not only in the *Mersey Docks Case* (1), to which the Lord Chancellor has referred, but also in the *Hull Dock Case* (2) itself, we are told that you are not to resort to the proportional, or what has been described as the water-area method of ascertaining the profits of the rateable hereditament, unless it is necessary to do so. The proper mode is, so far as you can, to ascertain the rateable value by means of what has been called (though not quite accurately) the parochial method.

But upon the facts which are stated in the present case, I am wholly unable to come to the conclusion that there is such necessity as should compel the Court to adopt the proportional or water-area method in this case; and, in my opinion, it would be unjust to do so, because it may be that the docks in one parish, either from their superior situation or from their superior appliances, or from their situation relatively to the

(1) L. R. 7 Q. B. 643. (2) 18 Q. B. 325.

requirements of some particular trade, or for some similar reason, are more resorted to, and therefore have a greater profit-earning capacity than the docks forming another part of the undertaking of the dock company; and it seems to me that where such is the case, where there is an inequality in profit-earning capacity between different docks forming part of the undertaking, it would be unjust to increase or to diminish the rates of either parish by the mere proportional method. I am therefore of opinion that the first appeal fails.

With regard to the second appeal I will only say this: that Mr. Balfour Browne in his argument seemed to me to wish to have it both ways. He desires and he is entitled to have the rateable value of the hereditaments within his union enhanced by the fact that they are capable of being employed, and are employed, for the purpose of carrying on a beneficial business. But on the other hand he desires to ignore and altogether repudiate the statutory conditions upon which alone that business can be carried on by the dock company upon the premises.

But it is not necessary to say much upon this appeal, because it is obvious from Lopes L.J.'s judgment that the learned judges who formed the majority in the Court of Appeal would not have decided in the way they did had they not felt themselves bound by something which was said in the course of the judgment delivered in the *Erith Case* (1). My Lords, I am of opinion that the learned judges misunderstood what was said by the Lord Chancellor in that case—that they overlooked the passage in the *Erith Case* (1) to which Lord Halsbury referred, and which has now been referred to by the Lord Chancellor, and that that being so, we are only deciding in accordance with the opinion which they would have expressed had they not laboured under this misunderstanding, when we decide that the second appeal should succeed.

The original appeal dismissed, and the order of the Court of Appeal upon that point affirmed with costs here and below.

The order of the Court of Appeal upon the point

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raised in the cross appeal reversed, and the order of the Queen's Bench Division (namely, that as regards the railway and tramway lines the contention of the dock company was correct) restored with costs here and below; Cause remitted to the Queen's Bench Division.

Lords' Journals Nov. 23 1894.

Solicitors for poor law guardians: *John W. Sykes, for Chatham & Son, Hull.*

Solicitors for dock company: *Chester & Co.*

[HOUSE OF LORDS.]

H. L. (E.)
1895
Feb. 14.

TIMOTHY WHITE . . . . . APPELLANT;

AND

GUSTAV MELLIN . . . . . RESPONDENT.

Libel—Defamation—Slander of Goods of a Rival Trader—Disparagement without Special Damage—Injunction.

An action will not lie for a false statement disparaging a trader's goods where no special damage is proved.

Where an action will not lie for defamation an injunction will not be granted.

Quære, whether an action will lie in any case for disparaging a trader's goods merely by stating that some other trader's goods are better, either generally or in this or that respect.

Western Counties Manure Company v. *Lawes Chemical Manure Company* (L. R. 9 Ex. 218) commented on.

Evans v. *Harlow* (5 Q. B. 624) approved.

The defendant sold the plaintiff's "Infants' Food," affixing to the plaintiff's wrappers a label stating that the defendant's "food for infants and invalids" was far more nutritious and healthful than any other. It was not proved that the statement was untrue or that it had caused any damage to the plaintiff:—

Held, reversing the decision of the Court of Appeal and restoring that of Romer J. ([1894] 3 Ch. 276), that no action would lie and that no injunction to restrain the defendant ought to be granted.

THE respondent was the proprietor of Mellin's food for infants, which he sold in bottles enclosed in wrappers bearing the words

"Mellin's Infants' Food." The respondent was in the habit of supplying the appellant with these bottles, which the appellant sold again to the public after affixing on the respondent's wrappers a label as follows:—

"Notice.

"The public are recommended to try Dr. Vance's prepared food for infants and invalids, it being far more nutritious and healthful than any other preparation yet offered. Sold in barrels, each containing 1lb. nett weight, at 7½*d.* each, or in 7lb. packets 3*s.* 9*d.* each. Local agent, Timothy White, chemist, Portsmouth."

The appellant was the proprietor of Vance's food. Discovering this practice, the respondent brought an action against the appellant, claiming an injunction to restrain him and damages.

At the trial before Romer J. the plaintiff proved the above facts, and called two analysts and a physician the result of whose evidence is stated in Lord Herschell's judgment. Briefly, they testified that in their opinion Mellin's food was suitable for infants, especially up to the age of six months, and persons who could not digest starchy matters, and that Vance's food was unsuitable for such beings, nay pernicious and dangerous for very young infants. At the close of the plaintiff's case Romer J., being of opinion that the label was merely the puff of a rival trader and that no cause of action was disclosed, dismissed the action with costs. The Court of Appeal (Lindley, Lopes and Kay L.JJ.) being of opinion that the cause ought to have been heard out, discharged that judgment and ordered a new trial (1).

Feb. 11, 12. *Swinfen Eady* Q.C. and *Charles Macnaghten* for the appellant:—

To maintain an action for slander of goods the plaintiff must prove three things: (1.) that the statement is disparaging to the plaintiff's goods; (2.) that it is false; (3.) that it has caused special damage to the plaintiff. None of these things were proved. The defendant's label was a mere trading puff and would be so regarded by the purchasing public. Even if

(1) [1894] 3 Ch. 276.

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disparaging the statement was not false; whether one trader's goods are the best or better than another's is a matter of opinion, not of fact. Lastly, no special damage was proved to have happened or to be likely to happen. In *Evans* v. *Harlow* (1) there were express and strong words of disparagement of the plaintiff's goods, but as no special damage was alleged the declaration was held bad. In *Western Counties Manure Company* v. *Lawes Chemical Manure Company* (2) special damage was alleged and the declaration was held good. *Thomas* v. *Williams* (3) and *Ratcliffe* v. *Evans* (4) are inapplicable. The former was a case of a man passing off his own goods as those of another, and the latter was, to use the words of Bowen L.J. at p. 527, "an action on the case for damage wilfully and intentionally done without just occasion or excuse." See also Comyn's Digest, Action upon the Case for Defamation, G. 11.

Moulton Q.C. and *A. àB. Terrell* for the respondent:—

The defendant not having called witnesses the plaintiff's evidence was uncontradicted and must be taken to be true, namely, that the defendant's food was inferior to the plaintiff's for the purpose for which it was sold. The words which were manifestly disparaging were therefore shewn to be false. It is not a case of damages, but of injunction, and if there is a reasonable probability of damage, even without actual damage, an injunction will be granted. The three necessary conditions which entitle a plaintiff to an injunction restraining a libel are, (1.) that there is a statement unequivocally relating to the plaintiff or his goods; (2.) the statement must be false; and (3.) injurious—that is actually or probably productive of injury. To obtain an injunction it is not necessary to prove actual damage; it is enough to shew that the words are calculated to injure the plaintiff's trade: *Thomas* v. *Williams* (3). Here the words were calculated to divert customers from the plaintiff to the defendant. All the necessary elements are present here. Lindley L.J. rightly states the law: "If that statement has caused injury to or is calculated to injure the plaintiff this

(1) 5 Q. B. 624.
(2) L. R. 9 Ex. 218.
(3) 14 Ch. D. 864.
(4) [1892] 2 Q. B. 524.

action will lie." An untrue statement though bonâ fide may be restrained by injunction: *Halsey* v. *Brotherhood* (1). *Bonnard* v. *Perryman* (2) shews the jurisdiction of the Court to restrain the publication of a libel, and an injunction may be granted where no action for damages would lie.

[LORD HERSCHELL L.C. referred to *Canham* v. *Jones* (3).]

Swinfen Eady Q.C. in reply referred to *Malachy* v. *Soper* (4) as to the necessity for special damage, where (as here) the words were written not of the plaintiff in the way of his trade, but of the goods he traded in.

The House took time for consideration.

Feb. 14. LORD HERSCHELL L.C. (after stating the facts):—

My Lords, in the Court of Appeal Lindley L.J. stated the law thus: "If upon hearing the whole of the evidence to be adduced before him the result should be that the statement contained in the label complained of is a false statement about the plaintiff's goods to the disparagement of them, and if that statement has caused injury to or is calculated to injure the plaintiff, this action will lie." Lopes L.J. said: "All I desire to say is that, in my opinion, it is actionable to publish maliciously without lawful occasion a false statement disparaging the goods of another person and causing such other person damage, or likely to cause such other person damage."

None of the learned judges in the Court of Appeal dealt with the evidence which had been adduced on behalf of the plaintiff; but I think it must be taken that they had arrived at the conclusion that that evidence did bring the case within those statements of the law. Of course, if the plaintiff, on his evidence, had made out no case, he could not complain that the learned judge decided against him and did not hear the witnesses for the defendant; the action was in that case properly dismissed. I take it, therefore, that although the learned judges did not analyse the evidence or make any reference to it, they must have

(1) 15 Ch. D. 514; 19 Ch. D. 386.
(2) [1891] 2 Ch. 269.
(3) 2 V. & B. 218.
(4) 3 Bing. N. C. 371.

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concluded that it established a case coming within the law as they laid it down. My Lords, as I understand, in the view of those learned judges, or in the view of Lindley L.J., to take his statement of the law in the first place, it was necessary in order to the maintenance of the action that three things should be proved: that the defendant had disparaged the plaintiff's goods, that such disparagement was false, and that damage had resulted or was likely to result. Now, my Lords, the only statement made by the defendant by means of the advertisement is this: that Vance's food was the most healthful and nutritious for infants and invalids that had been offered to the public. The statement was perfectly general, and would apply in its terms not only to the respondent's infants' food but to all others that were offered to the public. I will take it as sufficiently pointed at the plaintiff's food by reason of its being affixed to a bottle of the plaintiff's food when sold, and that it does disparage the plaintiff's goods by asserting that they are not as healthful and as nutritious as those recommended by the defendant. The question then arises, Has it been proved on the plaintiff's own evidence that that was a false disparagement of the plaintiff's goods?

I will state what I understand to be the result of the plaintiff's evidence. Mellin's food for infants and invalids is a preparation of such a nature that the food is said to be predigested, and therefore not to make that call upon the digestion which food ordinarily does; that as regards children under six months of age Mellin's food is the only one which could be suitably used in the place of the ordinary means of nourishment, the mother's milk, and that any farinaceous food would at that age be not only not nutritious but prejudicial. And so far, accepting the plaintiff's evidence for this purpose, there being no evidence to the contrary, the plaintiff, I think, establishes that his food was specially meritorious for that class of cases, and that it would not be correct to say that as regards these children of very tender age Vance's food or any other farinaceous food would be not only more healthful and nutritious, but as healthful and nutritious. But then it appears that when a child has passed the age up to which nutrition at the breast may ordinarily be

said to continue, the use of some farinaceous food is not only not prejudicial but desirable, and that if the child were to be always brought up upon a food which would be suitable during the very earliest weeks or months, its digestion would be likely to suffer rather than benefit, and there would be not more, but less nourishment. After twelve months, as I understand the evidence, the farinaceous food would be distinctly better for the purposes of nutrition and health than this pre-digested food. That, my Lords, I take to be a fair statement of the result of the evidence. Can it be said, under those circumstances, that it is a false disparagement of the plaintiff's goods to say that this other preparation—Vance's—is more nutritious and healthful for infants and invalids? I put aside the question of invalids: upon that there was no evidence at all. The plaintiff did not say that his was more healthful, or that the defendant's was not more healthful. It is therefore unnecessary to consider the case of invalids, and it is enough to confine one's attention to the case of infants.

The word "infants" is not in ordinary parlance confined to children of very tender age. If one looks at its derivation etymologically it would apply to children so long as they are not able to articulate distinctly—not able to speak—and nobody would hesitate to refer to children, I should say, at least under two years of age as infants, just as much as they would to children under six months of age. Therefore, if you look at the class of infants as a whole, it is by no means shewn that the statement that Vance's food is more nutritious and healthful than the plaintiff's food is false. If the reference had been specially to that very early period of life during which Mellin's food would be beneficial and the other prejudicial, no doubt a statement of that description might well be said to be a false statement; but looking fairly at the language used and the meaning to be attributed to it, I am not satisfied that it has been shewn that by means of this advertisement the defendant falsely disparaged the plaintiff's goods. But, my Lords, assuming that he did so, the Court of Appeal regarded it as requisite for the maintenance of the action that something further should be proved, and that is that the disparaging statement has caused

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injury to or is calculated to injure the plaintiff. Upon that there is a complete absence of evidence. The plaintiff was called, but he did not state that he had sustained any injury, nor did he even say that it was calculated to injure him, and I own it seems to me impossible, in the absence of any such statement or evidence, to say that it is a case in which such must be the necessary consequence; on the contrary, speaking for myself, I should doubt very much whether it was likely to be the consequence. After all, the advertisement is of a very common description, puffing, it may be, extremely and in an exaggerated fashion, these particular goods, Vance's food. That advertisement was outside the wrapper; inside was found an advertisement of Mellin's food, in which Mellin's food was stated to be recommended by the faculty as best for infants and invalids. Why is it to be supposed that any one buying this bottle at the chemist's would be led to believe that Mellin's food which he had bought was not a good article or not as good an article as another, merely because a person who obviously was seeking to push a rival article said that his article was better? My Lords, why should people give such a special weight to this anonymous puff of Vance's food, obviously the work of some one who wanted to sell it, as that it should lead him to determine to buy it instead of Mellin's food, which was said to be recommended by the faculty as the best for infants and invalids? I confess I do not wonder that the plaintiff did not insist that he had sustained injury by what the defendant had done. There is an entire absence of any evidence that the statement complained of either had injured or was calculated to injure the plaintiff. If so, then the case is not brought even within the definition of the law which Lindley L.J. gives.

Lopes L.J. adds the word "maliciously," that "it is actionable to publish maliciously without lawful occasion a false statement disparaging the goods of another person." By that it may be intended to indicate that the object of the publication must be to injure another person, and that the advertisement is not published bonâ fide merely to sell the advertiser's own goods, or at all events, that he published it with a knowledge of its falsity. One or other of those elements, it seems to me, must be intended

by the addition of the word "maliciously." Both those are certainly absent here. There is nothing to shew that the object of the defendant was other than to puff his own goods and so sell them, nor is there anything to shew that he did not believe that his food was better than any other.

The only case which the learned counsel for the respondent was able to rely upon as at all approaching the present is the case of the *Western Counties Manure Company* v. *Lawes Chemical Manure Company* (1), in which case a declaration was held good which alleged the disparagement of the plaintiffs' goods by stating that they were inferior to those sold by the defendants. In that case special damage was alleged in the declaration, and I think that that allegation was regarded by both the learned judges who were parties to the decision as material and essential. In the earlier case of *Evans* v. *Harlow* (2) a statement was complained of which distinctly disparaged the plaintiff's goods. It cautioned the public against them, it pointed out to the public that they were not likely to realize the purpose for which they were designed, and the allegation was that "the defendant published a libel of and concerning the plaintiff and of and concerning him in his said trade and of and concerning his design as follows." In that case there was no allegation of special damage; there was a demurrer to the declaration, and the declaration was held bad. Now, the only distinction that I can see between that case and the case of the *Western Counties Manure Company* v. *Lawes Chemical Manure Company* (1) is that in the latter case special damage was alleged, whereas in the former it was not. Bramwell B. does not call specific attention to the differentia between the case before him and the case of *Evans* v. *Harlow* (2), but he says that there is nothing in any of the cases inconsistent with the judgment which he is pronouncing. Pollock B., who was the other judge, pointed out that in *Evans* v. *Harlow* (2) there was no allegation of special damage. Therefore, my Lords, the utmost that the *Western Counties Manure Company* v. *Lawes Chemical Manure Company* (1) can be claimed as an authority for is this, that an action will lie for falsely disparaging another's goods where special damage

(1) L. R. 9 Ex. 218. (2) 5 Q. B. 624.

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results. *Evans* v. *Harlow* (1) is a distinct authority that it will not lie where special damage does not result. In the present case it cannot be pretended that any special damage was either alleged or proved.

Mr. Moulton sought to extricate himself from that difficulty in this way: he said that if this were an action for damages that might be a well-founded objection to it, but that it is not an action for damages but a claim for an injunction, and that although it may be that to support an action for damages it would be necessary to allege and prove special damage, that is not necessary where an injunction is claimed—that it is enough if a false statement is made and is likely to be repeated.

Now, my Lords, no authority was cited to shew that a Court of Equity under any of the branches of its jurisdiction had ever granted or would grant an injunction in such a case. Certainly there is no rule of equity under which it may be said generally that a Court of Equity would restrain every publication of a false statement. In the case of *Canham* v. *Jones* (2) the bill stated that a certain Mr. Swainson had been the sole proprietor of a secret for preparing the medicine called "Velno's Vegetable Syrup," and that the plaintiff had obtained title to it under his will and had sold the medicine. Then the complaint was that the defendant, who had been a servant of Swainson, was employed in the preparation of the syrup but was not acquainted with the complete preparation, certain essential ingredients being introduced only by Swainson himself and only in the presence of the plaintiff. Then it alleged "that the defendant being discharged from his service had made and advertised for sale a spurious preparation under the name of Velno's Vegetable Syrup, stated by him to be the same medicine in composition and quality as that made by Swainson and the plaintiff, the defendant's advertisement certifying that the medicine prepared by him at his residence under the name of Velno's Vegetable Syrup is precisely the same with that made and sold by the late Mr. Swainson." It was alleged that that was untrue, and that it was a spurious preparation pretending to be the same when it really was not. To that bill the defendant put in a general demurrer

(1) 5 Q. B. 624. (2) 2 V. & B. 218.

for want of equity. That demurrer was sustained by the Vice-Chancellor, Sir Thomas Plumer, although for the purposes of that demurrer it was taken that the defendant selling this article was falsely stating that it was the same as the plaintiff's.

My Lords, the learned counsel relied upon recent cases in which an injunction has been granted to restrain the publication of a libel, and he suggested that there had been a growth of equity jurisprudence which had brought within its ambit a class of cases which were previously not regarded as within it. But when the case in which the Court of Appeal laid down that an injunction might be granted to restrain the publication of a libel is looked at, it will be seen that the decision was not founded upon any principle or rule of equity jurisprudence, but upon the fact that a Court of Common Law could have granted such an injunction in an action of libel, and that since the Judicature Act the power which a Court of Common Law possessed in that respect is now possessed also by the Court of Chancery. That was distinctly the ground upon which the judgment was founded, that "the 79th and 82nd sections of the Common Law Procedure Act 1854 undoubtedly conferred on the Courts of Common Law the power, if a fit case should arise, to grant injunctions at any stage of a cause in all personal actions of contract or tort, with no limitation as to defamation"; and then, inasmuch as those powers are now possessed by the Chancery Division, it was held that they likewise could in such cases grant an injunction. That was the decision in *Bonnard* v. *Perryman* (1).

My Lords, obviously to call for the exercise of that power it would be necessary to shew that there was an actionable wrong well laid, and if the statement only shewed a part of that which was necessary to make up a cause of action—that is to say, if special damage was necessary to the maintenance of the action, and that special damage was not shewn—a tort in the eye of the law would not be disclosed, the case would not be within those provisions, and no injunction would be granted. I think, therefore, for these reasons, that the plaintiff would not be entitled to an injunction, any more than he would be entitled

(1) [1891] 2 Ch. 269.

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to maintain an action unless he established all that was necessary to make out that a tort had been committed; and for the reasons which I have given, taking the *Western Counties Manure Company* v. *Lawes Chemical Manure Company* (1) to be good law, he has not brought himself within it.

But, my Lords, I cannot help saying that I entertain very grave doubts whether any action could be maintained for an alleged disparagement of another's goods, merely on the allegation that the goods sold by the party who is alleged to have disparaged his competitor's goods are better either generally or in this or that particular respect than his competitors' are. Of course, I put aside the question (it is not necessary to consider it) whether where a person intending to injure another, and not in the exercise of his own trade and vaunting his own goods, has maliciously and falsely disparaged the goods of another, an action will lie; I am dealing with the class of cases which is now before us, where the only disparagement consists in vaunting the superiority of the defendant's own goods. In *Evans* v. *Harlow* (2) Lord Denman expressed himself thus: "The gist of the complaint is the defendant's telling the world that the lubricators sold by the plaintiff were not good for their purpose, but wasted the tallow. A tradesman offering goods for sale exposes himself to observations of this kind, and it is not by averring them to be 'false, scandalous, malicious and defamatory' that the plaintiff can found a charge of libel upon them. To decide so would open a very wide door to litigation, and might expose every man who said his goods were better than another's to the risk of an action." My Lords, those observations seem to me to be replete with good sense. It is to be observed that *Evans* v. *Harlow* (2) does not appear to have been decided on the ground merely that there was no allegation of special damage. The only judge who alludes to the absence of such an allegation is Patteson J. No reference to it is to be found either in the judgment of Lord Denman or in the judgment of Wightman J., the other two judges who took part in that decision; and I think it is impossible not to see that, as Lord Denman says, a very wide door indeed would be opened to

(1) L. R. 9 Ex. 218. (2) 5 Q. B. 624.

litigation, and that the Courts might be constantly employed in trying the relative merits of rival productions, if an action of this kind were allowed.

Mr. Moulton sought to distinguish the present case by saying that all that Lord Denman referred to was one tradesman saying that his goods were better than his rival's. That, he said, is a matter of opinion, but whether they are more healthful and more nutritious is a question of fact. My Lords, I do not think it is possible to draw such a distinction. The allegation of a tradesman that his goods are better than his neighbour's very often involves only the consideration whether they possess one or two qualities superior to the other. Of course "better" means better as regards the purpose for which they are intended, and the question of better or worse in many cases depends simply upon one or two or three issues of fact. If an action will not lie because a man says that his goods are better than his neighbour's, it seems to me impossible to say that it will lie because he says that they are better in this or that or the other respect. Just consider what a door would be opened if this were permitted. That this sort of puffing advertisement is in use is notorious; and we see rival cures advertised for particular ailments. The Court would then be bound to inquire, in an action brought, whether this ointment or this pill better cured the disease which it was alleged to cure—whether a particular article of food was in this respect or that better than another. Indeed, the Courts of law would be turned into a machinery for advertising rival productions by obtaining a judicial determination which of the two was the better. As I said, advertisements and announcements of that description have been common enough; but the case of *Evans* v. *Harlow* (1) was decided in the year 1844, somewhat over half a century ago, and the fact that no such action—unless it be *Western Counties Manure Co.* v. *Lawes Chemical Manure Co.* (2)—has ever been maintained in the Courts of Justice is very strong indeed to shew that it is not maintainable. It is, indeed, unnecessary to decide the point in order to dispose of the present appeal.

For the reasons which I have given I have come to the

(1) 5 Q. B. 624.
(2) L. R. 9 Ex. 218.

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conclusion that the judgment of the Court below cannot be sustained, even assuming the law to be as stated by the learned judges; but inasmuch as the case is one of great importance and some additional colour would be lent to the idea that an action of this description was maintainable by the observations in the Court below, I have thought it only right to express my grave doubts whether any such action could be maintained even if the facts brought the case within the law there laid down.

Upon the whole, therefore, I think that the judgment of Romer J. was right and ought to be restored and that this appeal should be allowed, with the usual result as to costs; and I so move your Lordships.

LORD WATSON:—

My Lords, the ground of this action is slander, not of the plaintiff himself, in his personal or business capacity, but of an article of food which he manufactures and sells as "Mellin's Infants' Food." The defendant, who is a chemist, sells the plaintiff's food at his establishments in Portsmouth and its neighbourhood. He also sells another food, in which he has a proprietary interest, which is known as "Dr. Vance's Prepared Food for Infants or Invalids."

The alleged slander is contained in a label, notice or advertisement used by the defendant, by which "The public are recommended to try Dr. Vance's Prepared Food for Infants or Invalids, it being far more nutritious and healthful than any preparation yet offered." In his statement of claim, the plaintiff avers that the defendant was in the habit of affixing that label to the wrappers in which "Mellin's Infants' Food" is made up for sale. The defendant admits that he affixed the label to various articles sold by him, and in some cases to the wrappers in which the plaintiff's food is sold, care being always taken that the printed or written matter on the wrappers should not be interfered with or rendered illegible. Beyond that admission there is no evidence bearing on the point.

The wrong complained of being the slander of goods, the fact that the representations made by the defendant in the label already referred to might be calculated to disparage the food

manufactured by the plaintiff and to interfere with its sale can afford no cause of action. Every extravagant phrase used by a tradesman in commendation of his own goods may be an implied disparagement of the goods of all others in the same trade; it may attract customers to him and diminish the business of others who sell as good and even better articles at the same price; but that is a disparagement of which the law takes no cognizance. In order to constitute disparagement which is, in the sense of law, injurious, it must be shewn that the defendant's representations were made of and concerning the plaintiff's goods; that they were in disparagement of his goods and untrue; and that they have occasioned special damage to the plaintiff. Unless each and all of these three things be established, it must be held that the defendant has acted within his rights and that the plaintiff has not suffered any legal injuria.

It is true that in the present case the plaintiff, who does not aver that he has sustained any special damage, only claims an injunction. That circumstance cannot make any difference in his favour. Damages and injunction are merely two different forms of remedy against the same wrong; and the facts which must be proved in order to entitle a plaintiff to the first of these remedies are equally necessary in the case of the second. The onus resting upon a plaintiff who asks an injunction, and does not say that he has as yet suffered any special damage, is if anything the heavier, because it is incumbent upon him to satisfy the Court that such damage will necessarily be occasioned to him in the future.

Having examined the plaintiff's evidence, and having also heard all that could possibly be said for it from Mr. Moulton, I must confess my inability to appreciate the reasons which induced the learned judges of the Appeal Court to disapprove of the course which had been taken by Romer J. It is not suggested that the plaintiff had not ample opportunity of leading all the proof which he desired. The evidence which he did adduce appears to me to fail upon every point which was essentially necessary to his success in the action.

In the first place, I do not think the representation conveyed by the defendant's label is, in any legal sense, a representation

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of and concerning the infants' food of the plaintiff. It is a highly coloured laudation of Dr. Vance's food and nothing else. It makes no reference to the plaintiff's goods beyond what might be implied in the case of every other kind of food which is recommended and sold as being suitable for consumption by infant children. Nor, in my opinion, is the circumstance that the label was sometimes put upon the plaintiff's wrappers, however distressing it might be to him, sufficient to convert it into a disparagement of the contents of the wrapper. An advertisement in the window of a bootmaker, to the effect that he makes the best boots in the world, may be more offensive to his next neighbour in the same trade than to a bootmaker at a distance; but the disparagement in kind and degree is identical in both cases.

In the second place, assuming that the representation did refer to the plaintiff's food, I am of opinion that his evidence does not prove it to be untrue. At the best, the evidence comes to no more than this, that the plaintiff's food is the more suitable for children under six months old who cannot get their mother's milk; and that Dr. Vance's food is the more suitable for children above that age who are not the victims of indigestion. In these circumstances it appears to me to be difficult to hold that it was not open to either of the parties to say that his was the best food for infants without conveying a false imputation upon the food of the other.

In the third and last place, I am of opinion that, even if the plaintiff had proved that the representation concerned his food and was wilfully false, his evidence discloses no cause of action. There is not in the whole of it an attempt to prove that the plaintiff has suffered in the past or is likely to suffer in the future any damage whatever through the representations of which he complains.

I therefore agree that the order of the Court of Appeal ought to be reversed, and the judgment of Romer J. restored.

LORD MACNAGHTEN:—

My Lords, I entirely agree.

Upon the legal aspect of the case I have nothing to add. I

only wish to protest against it being supposed that there is any shadow of foundation in equity for the present claim. I mean no imputation upon the draftsman, because the claim as originally launched was founded on an implied contract arising out of the custom of trade. And if that could have been made out the respondent would have had something to say.

Mr. Moulton in his ingenious argument endeavoured to rest his case on some ground which was neither law nor equity, but something between the two. It was, he argued, a legitimate development of equitable principles now that a Court of Equity is free to deal with legal rights.

A reference to a case in the Court of Appeal when Lord Cairns sat there as Chancellor with James and Mellish L.JJ. will suffice, I think, to dispel that notion. A gentleman of the name of Knott had published a pamphlet about insurance companies. He had collected a large body of statistics, and with the light thus afforded he compared the relative stability of different offices. One office thought the comparison particularly odious and applied for an injunction. The application was refused by Hall V.-C. There was an appeal from his decision. The case of the appellants was mainly rested on the judgment of Malins V.-C. in *Dixon* v. *Holden* (1). Lord Cairns L.C. in his judgment quoted two passages from the Vice-Chancellor's judgment in *Dixon* v. *Holden* (1). One of them was in these words: "'In the decision I arrive at' said the Vice-Chancellor" (Malins) "'I beg to be understood as laying down that this Court has jurisdiction to prevent the publication of any letter, advertisement or other document which if permitted to go on would have the effect of destroying the property of another person, whether that consists of tangible or intangible property, whether it consists of money or reputation.'" The Lord Chancellor's comment was this: "I am unable to accede to these general propositions. They appear to me to be at variance with the settled practice and principles of this Court": *Prudential Assurance Company* v. *Knott* (2).

I think Romer J. was quite right in the view which he took, and that he acted properly in dismissing the action at the close

(1) L. R. 7 Eq. 488. (2) L. R. 10 Ch. 142.

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of the plaintiff's case. I concur in the motion proposed by the Lord Chancellor.

LORD MORRIS:—

My Lords, I also concur. If the averment in the statement of claim that there is an implied condition in the trade as therein set forth (1) be now struck out, as it is admitted it must be, because there was no proof of it at the trial, in my opinion the statement of claim discloses no cause of action at all. It contains no averment of the act complained of being done maliciously, nor does it allege any special damage; not that I think, even if it did, any cause of action would be established on the evidence, because the only reflection of the defendant upon the plaintiff's article was that his, the defendant's, was more healthful and nutritious. Such a statement simpliciter, in my opinion, conveys no right of action to the plaintiff. A party does not lay himself open to an action who bonâ fide praises his goods as better than another's, and it cannot give a cause of action because on the trial of those competing articles the defendant's article may be ascertained not to be better than the plaintiff's.

But it was said that although an action for damages could not be sustained, an injunction in equity could be obtained. It would certainly be a strange and novel chapter of equity if a party could get a perpetual injunction to restrain an act which is not an illegal act.

LORD SHAND:—

My Lords, I also concur in the judgment which the Lord Chancellor proposes, and in the reasons in support of it which have been stated by your Lordships. I only desire to add that for my part I should be quite content with the ground of judg-

(1) The condition was alleged in the statement of claim as follows:—

"The said food is sold wholesale by the plaintiff, and it is a well-understood condition in the trade of such sale that the said food shall be sold by the retail sellers in identically the same form as to wrappers and labels as that in which it is supplied, and without any additions or alterations thereto or thereof except that the retailer may affix a label with his own name and address thereon."

ment which Romer J. expressed in dismissing the case after the evidence of the plaintiff had been led. The learned judge then said: "No doubt, on the evidence on the plaintiff's side, so far as that goes, it does tend to shew that his food is the best, at any rate for infants under six months old"; and he goes on to say: "But, as I have said, no person on seeing what the defendant has done would have read this statement put upon the plaintiff's cases as being anything more than a rival puff. Of course it is always very annoying to a man who has a good article to find a person who is puffing a rival article stating that the rival article is really the best, and it is still more annoying to find that statement put upon the goods of the man who complains. But, however annoying the form of the advertisement of the defendant may be to the plaintiff, I come to the conclusion that what has been done by the defendant has not amounted in any true sense to a trade libel as against the plaintiff, and that the plaintiff has no legal remedy in respect of it." It appears to me that in order to constitute a libel of the class here complained of there must be a statement in disparagement of the plaintiff's goods, and that the statement must be false and injurious. But, then, I do not think that disparagement in a popular sense would be enough for the plaintiff's case. It is a disparagement of one man's goods to say that they are inferior to the goods of another; but such a statement cannot, I think, be the ground of a claim of damages or a claim for injunction such as the plaintiff here asked. If there had been in this case an imputation of intentional misrepresentation for the purpose of misleading purchasers, or a statement that Mellin's food was positively injurious, or that it contained deleterious ingredients, and would be hurtful if it were used, I think there would have been a good ground of action; and if the authorities have not settled the law otherwise, I should even say that an averment of special damage ought not to be necessary. But when all that is done is making a comparison between the plaintiff's goods and the goods of the person issuing the advertisement, and the statement made is that the plaintiff's goods are inferior in quality or inferior, it may be, in some special qualities, I think this cannot be regarded as a disparagement of which the law will take cognizance.

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I fully concur in the views stated at the close of the Lord Chancellor's opinion with this addition, that as far as my mind is concerned I do not feel merely the doubt that his Lordship expressed, because I think in point of law in the various cases to which his Lordship referred as illustrations an action would not lie. That view is supported by the reasons given in the judgment of Lord Denman in the case of *Evans* v. *Harlow* (1), which I regard as the leading authority applicable to cases of this class.

Therefore, upon the simple ground that the advertisement complained of, though clearly it applied to the plaintiff's goods, really cannot be characterized as a libel, I am of opinion that the action was rightly dismissed by the learned judge before whom it was tried.

LORD HERSCHELL L.C.:—

My Lords, my noble and learned friend Lord Ashbourne, who is unable to be present to-day, has asked me to say that he entirely concurs in the judgment proposed.

Order of the Court of Appeal reversed; Judgment of Romer J. restored, with costs here and in the Court of Appeal; Cause remitted to the Chancery Division.

Lords' Journals 14th Feb. 1895.

Solicitor for appellant: *A. W. Mills for Cousins & Burbidge, Portsmouth.*

Solicitors for respondent: *Eldred & Bignold.*

(1) 5 Q. B. 624.

[HOUSE OF LORDS.]

GEORGE JOBSON BROCKLESBY . . . APPELLANT;

AND

THE TEMPERANCE PERMANENT BUILDING SOCIETY, THE NINETEENTH CENTURY BUILDING SOCIETY, AND JOSEPH CORKE (*Ex parte* AS TO JOSEPH CORKE) . . . . . RESPONDENTS.

H. L. (E.) 1895 *March* 15.

Principal and Agent—Excess of Authority—Liability of Principal—Mortgage—Authority to pledge Title-Deeds for a particular Sum—Forged Deeds—Redemption.

Where a principal entrusts an agent with securities and instructs him to raise a certain sum upon them, and the agent borrows a larger sum upon the securities and fraudulently appropriates the difference (the lender acting bonâ fide and in ignorance of the limitation), the principal cannot redeem the securities without paying the lender all he has lent, although the agent has obtained the loan by fraud and forgery, and although the lender did not know that the agent had authority to borrow at all, and made no inquiry.

Perry-Herrick v. *Attwood* (2 De G. & J. 21) followed.

The decision of the Court of Appeal ([1893] 3 Ch. 130) affirmed.

THE appellant, a solicitor in partnership with his son, owed the Union Bank of London £750, for which the bank held as security a mortgage of freehold property at Wimbledon from Corke to the appellant, and the title-deeds of a leasehold house in Holloway belonging to the appellant. Being desirous to pay off this debt, and also to borrow £1500, he was advised by his son that Ashby & Co.'s Bank would lend the required amount upon the securities held by the Union Bank. Thereupon the appellant gave his son documents as follows:—

"9, Walbrook, London, E.C.,
"30th May, 1891.

"The Manager, Union Bank of London, Chancery Lane,

"Dear Sir,—Please permit the bearer to see my securities, and oblige,

"Yours truly,
"Geo. J. Brocklesby."

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On the 3rd of June he gave his son the following:—

"9, Walbrook, London, E.C.,
"3rd June, 1891.

"The Manager, Union Bank of London, Chancery Lane.

"Please to hand to the bearer of this (on payment of the balance of my loan and interest) the deeds deposited by me with you as security for the loan.

"Yours truly,
"Geo. J. Brocklesby."

The next day he gave him the following:—

"9, Walbrook, London, E.C.,
"4th June, 1891.

"To the Manager, Union Bank of London, Limited, Chancery Lane.

"Dear Sir,—Please give bearer (Ashby's Hampton Court Bank) inspection of my deeds, and on their paying the amount due thereon hand the securities over to them, they having arranged to lend me a further sum of £1500, which I require by the 1st July next.

"Yours faithfully,
"Geo. J. Brocklesby."

The son then opened an account in the name of his father's firm with the London and South Western Bank, forging his father's signature for the purpose, obtained from the London and South Western Bank £3500, paid off the £750 due to the Union Bank, handed £1500 to his father (representing to him that it was lent by Ashby & Co.), and kept the rest. To effect this he shewed the Union Bank the documents of the 30th of May and the 3rd of June and obtained from them the title-deeds, which he deposited with the London and South Western Bank, forging his father's signature to an equitable charge in favour of that bank upon the Wimbledon and Holloway properties. Being afterwards pressed by the London and South Western Bank for repayment of their loan, the appellant's son obtained an assignment from Corke of the equity of redemption of the Wimbledon property and forged the appellant's signature to a deed trans-

ferring to himself the appellant's mortgage on that property. He then obtained £3000 from the Temperance Permanent Building Society upon the security of a mortgage from himself of that property, and £600 from the Nineteenth Century Building Society upon the security of a mortgage of the Holloway property, forging the appellant's signature to the mortgage deed. With these sums of £3000 and £600 the appellant's son paid off the debt to the London and South Western Bank and obtained the title-deeds held by them, handing the Wimbledon deeds to the Temperance Society and the Holloway deeds to the Nineteenth Century Society. There was no evidence that any of the documents of the 30th of May, the 3rd of June, or the 4th of June respectively were shewn to or brought to the knowledge of the London and South Western Bank, or the Temperance Permanent Building Society, or the Nineteenth Century Building Society.

The son having absconded and his frauds being discovered, the appellant brought an action against the two building societies and Corke (the present respondents), claiming to redeem the mortgages on payment to the societies, or such one of them as might be entitled thereto, of the sum of £2250—the amount he had authorized the son to borrow—with interest, and a declaration accordingly.

Wright J. made an order declaring that the Temperance Permanent Building Society were entitled to a charge by way of equitable deposit on the mortgage and title-deeds relating to the Wimbledon property to secure £3000 and interest, and that the Nineteenth Century Building Society were entitled to a charge by way of equitable deposit on the title-deeds relating to the Holloway property to secure £600 and interest. This judgment was affirmed by the Court of Appeal (Lindley, Lopes, and A. L. Smith L.JJ. (1))

March 14, 15. *Lawson Walton* Q.C. and *R. Woodfin*, for the appellants:—

The respondents in order to substantiate this claim must establish two propositions: first, that the London and South

(1) [1893] 3 Ch. 130.

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Western Bank were entitled to charge the property, as against the appellant, with the whole of the sum advanced on the deeds to the appellant's son; and, secondly, that they stand in the shoes of the bank. Neither of these propositions is maintainable. The bank could only claim the amount which the appellant authorized his son to borrow. The principal is only bound by the agent when the latter acts within the scope of his authority, or where the principal has been guilty of laches enabling the agent to exceed the authority. The present case does not fall within either of these categories.

[LORD HERSCHELL L.C. referred to *Perry-Herrick* v. *Attwood* (1).]

That case has no application; it was not a case of agency, the mortgagor in possession of the title-deeds borrowed upon them for himself. Here moreover there is no estoppel by negligence and no question of priorities, as there was in that case. Here the authority was only to raise £2250 and the lender was put on inquiry. The mere possession of title-deeds of property in land is no index of ownership, though possession of personal property when the instrument is in blank may imply ownership. In both the cases cited by Lindley L.J., *Perry-Herrick* v. *Attwood* (1) and *Briggs* v. *Jones* (2), the securities themselves indicated that the holder was the owner. There was here no authority addressed to the lender, or shewn to him, or even brought to his knowledge, and there is no principle of equity which disentitles an owner from repudiating the unauthorized dealings of his agent. The principle of *Fuentes* v. *Montis* (3) applies.

[LORD HERSCHELL L.C. referred to *Cole* v. *North Western Bank* (4).]

Certainly where the agent forges his principal's name, as the son did in the memorandum of deposit, the principal is not bound.

Secondly, even if the bank could sustain a claim to the whole amount advanced by them, the respondents are not in the same position. A new set of circumstances arose and wholly new

(1) 2 De G. & J. 21.
(2) L. R. 10 Eq. 92.
(3) L. R. 3 C. P. 268; 4 C. P. 93.
(4) L. R. 10 C. P. 354.

contracts were executed. One contract was executed by the appellant's son himself who induced the owner of the equity of redemption to assign it to him, and in the other he forged his father's name. An act of an agent which was only made possible by crime is not the natural result and does not carry the weight of the original authority. But for the forged transfer the son could not have shewn a good title to the respondent societies. The case comes exactly within the principle of *Baxendale* v. *Bennett* (1), in which a blank bill was taken out of a drawer and a forged indorsement was made. In an action by an indorsee for value the Court of Appeal decided in favour of the defendant, and Bramwell L.J. at p. 530 said: "I confess I think he has been negligent . . . but then this negligence is not the proximate or effective cause of the fraud. A crime was necessary for its completion. Then the *Bank of Ireland* v. *Evans' Trustees* (2) shews under such circumstances there is no estoppel."

[LORD HERSCHELL L.C. referred to *Martinez* v. *Cooper* (3) and *Evans* v. *Bicknell* (4).]

If the agent gains his ends by crime, the consequences of the crime are not attributable to the principal. There was besides no actual transfer of the debt from the bank to the respondents, and therefore the debt was extinguished. The charge must in such a case expressly be kept alive: *Parry* v. *Wright* (5).

Further, where a mortgagee seeks to transfer his charge he cannot do so by splitting it up: there is no power of dividing such an equitable charge as was claimed by the London and South Western Bank.

[They also cited *Northern Counties of England Fire Insurance Company* v. *Whipp* (6); *Taylor* v. *Needham* (7); *Chapman* v. *Chapman* (8); *Re Japanese Curtains and Patent Fabric Company, Ex parte Shoolbred* (9); *Beckett* v. *Cordley* (10).]

Crackanthorpe Q.C. and *T. Smith*] *Osler* for the Temperance

(1) 3 Q. B. D. 525.
(2) 5 H. L. C. 389.
(3) 2 Russ. 198.
(4) 6 Ves. 174, 190.
(5) 5 Russ. 142.
(6) 26 Ch. D. 482.
(7) 2 Taunt. 278.
(8) 13 Beav. 308; 20 L. J. (Ch.) 465.
(9) 28 W. R. 339.
(10) 1 Bro. C. C. 353.

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Society, and *Cozens-Hardy* Q.C. and *G. A. Watson* for the Nineteenth Century Society, were not heard.

LORD HERSCHELL L.C. (after stating the facts) :—

My Lords, this case belongs to a class unfortunately not unfamiliar to the Courts, in which one of the parties to the litigation must suffer on account of frauds which have been committed. Here the frauds were committed by the appellant's son, and the question is upon whom, on true legal principles applied to the transactions, that loss must fall.

There can be no doubt that the document of the 3rd of June was given by the father to the son in order that he might, by means of it, obtain money to pay off the Union Bank, and obtain also the deeds deposited with the Union Bank, and upon those deeds raise not only the £750, but a further sum of £1500. There can be therefore no question of this, that the father armed his son with that document which enabled him to go into the market, and was intended to enable him to go into the market to raise a sum of £2250, giving any lender of it the security of the father's deeds. It may be that the appellant intended that the transaction should take place with Messrs. Ashby & Co., of Molesey, although I do not think it is by any means clear that the father limited the son to a transaction with Messrs. Ashby, or that if the son (supposing him to have been acting honestly) had gone elsewhere because he could get the loan on better terms than he could from Messrs. Ashby, he would have been in the slightest degree exceeding the authority which the father gave him.

The document of the 4th of June was kept by the son, but was never used or acted upon. It is impossible to maintain that it in any way revoked or cancelled the authority of the 3rd of June.

The son went to the London and South Western Bank, armed with the authority which I have described, and he obtained from them an agreement to advance the sum of £3500. He, it is true, opened with that bank an account in the name of the firm; he enabled himself to do this by forging his father's signature; but none the less he raised from the bank the sum of

£3500, purporting to borrow on account of his father, whose authority he had to borrow upon the security which he gave to the extent of £2250. Either because the bank were desirous of receiving their loan, or for some other reason, an arrangement was afterwards entered into by the son with the Temperance Building Society and the Nineteenth Century Building Society by which money was to be provided to pay off the loan to the bank with interest. The sum paid to the bank amounted to £3600. How this was made up does not appear and it is not necessary to consider the question, because no point was raised in reference to it in the Court below. It was taken there to be the amount of principal and interest, and your Lordships must so take it on the present occasion. The son, for the purpose of this later transaction, appears to have committed further forgeries: he forged a transfer to himself of the mortgage from Corke to his father, and therefore appeared at the time he negotiated the loan from the Temperance Building Society to be the owner of the Wimbledon property. Ultimately the £3600 was paid to the London and South Western Bank; it was received by the solicitors of the bank, £3000 from the Temperance Building Society, and £600 from the Nineteenth Century Building Society, and the securities in the hands of the bank were handed over to the respondent societies in exchange for the cash, the Wimbledon deeds to the Temperance Building Society, and the Holloway deeds to the Nineteenth Century Building Society. The question is whether under these circumstances the plaintiff is entitled to redeem the deeds on payment only of the £2250, or on payment of the £3600.

It is necessary first of all to inquire what were the rights of the London and South Western Bank in respect of their advance of £3500 with interest thereon. It is contended on behalf of the appellant that they could only claim to retain the deeds for the sum which the appellant's son was in fact authorized by his father to borrow. The son, as I have shewn, was intrusted by his father with the document of the 3rd of June, and he was intrusted with the deeds which he was to procure by means of that document; and certainly there was nothing to indicate to the London and South Western Bank that the son was limited

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to a borrowing power of £2250, or to put them upon inquiry in any respect with reference to any such limit of authority. The transaction was a perfectly natural one. The son, who was a member of this firm of solicitors, was purporting to raise money on behalf either of the firm or a partner in the firm by means of deeds of which he was in possession under an authority signed by the father.

There can be no doubt that the mere possession of deeds of title, although that possession has been lawfully acquired from the real owner of them, will not of itself validate a security given by the person to whom the possession of the deeds has been committed where there was no authority given to him to use the deeds as security. That is old law, and was distinctly laid down in the case of *Martinez* v. *Cooper* (1). It is only if there has been on the part of the person who trusts the other with the deeds either fraud, or, as it has been sometimes said, such negligence as to be evidence of fraud, that the permitted possession of the deeds of another will validate a security given without the authority of the owner of the deeds. But in the case of *Perry-Herrick* v. *Attwood* (2), which came before Sir John Romilly in the year 1857, it was held that where a mortgagee permitted the mortgagor to have possession of his title-deeds, although the mere possession of itself would not have enabled the mortgagor to give a valid security, yet where that possession was coupled with an authority to use the deeds for the purpose of raising money, then the security was valid, not to the extent to which the mortgagee had given the mortgagor authority to raise money upon the deeds, but to the extent to which the mortgagor had, in fact, raised money upon them from a person who had no notice of any limitation in point of amount of the authority given. That decision was affirmed by the Lord Chancellor (3), who based his judgment upon this clear principle, which was stated to be well established in equity: that where a person has thus been intrusted with the possession of title-deeds with authority to raise money upon them, the owner of the deeds cannot take advantage of any limitation in point of amount which

(1) 2 Russ. 198.

(2) 25 Beav. 205; 2 De G. & J. 21.

(3) 2 De G. & J. 21.

he placed upon the authority to raise money as against a lender who had no notice of it.

It is quite true that in that case the mortgagor was authorized to use the deeds to raise money for his own purposes to a limited amount. In the present case, the son of the appellant was authorized to use the deeds to raise money as agent for his father, the owner of the deeds. But I confess I am quite unable to see any distinction in principle between the two cases which would render it right, proper, or reasonable that in the former case a lender should not be bound by a limitation of authority of which he was unaware, but that in the latter case he should be so bound. The cases seem to me to be in principle precisely the same; and I think that the Court below were quite right in extending (if it be an extension) the rule laid down in the case of *Perry-Herrick* v. *Attwood* (1) to the present case.

No doubt, as I have said, it is unfortunate that anyone should suffer on account of the fraud of the appellant's son; but, if one is to choose, there being admittedly no authority to the contrary, on whom the loss ought to fall in such a case as the present, surely it should rather fall upon one who has selected the agent to raise money for him, who has intrusted him for that purpose with his securities, and who, if he has limited his authority, has trusted him not to exceed that limit, than that it should fall upon those who, finding him in possession of the deeds with authority in fact to borrow, had no knowledge of the limitation of the amount which he was authorized to raise upon the security of the deeds.

So much, my Lords, as regards the London and South Western Bank. It appears to me not to admit of doubt that upon sound principles they ought to be held to be entitled to the possession of the deeds for the full amount of the money which they lent upon the security of them.

But then it is said that the transaction with the Temperance Building Society, at all events, was a subsequent and a different one, that the appellant's son did not in that case purport to borrow for his father as he had done from the bank, merely upon

(1) 2 De G. & J. 21.

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the security of the title deeds which he deposited with them; but that he purported to borrow for himself, and had forged deeds which represented himself as having become the owner of the mortgaged estate. The learned judges in the Court below held that there was no serious doubt that the respondent building society was entitled to stand in the shoes of the London and South Western Bank, and was entitled to hold the security to the extent to which they held it; and I see no reason whatever to differ from the conclusion at which they arrived. It is not disputed that the money received from the building societies went to pay off the London and South Western Bank; in fact, the London and South Western Bank received it directly from the building societies against the securities. Nor I think is it disputed that, if that had been all, their title would have been good—at least, would have been as good as the title of the London and South Western Bank. Can it really be made worse because the appellant's son went through the pretence of raising a loan for himself upon a title which he pretended to have but had not, because the documents which purported to give it him were forgeries? I really cannot see why it should. It is quite clear that the Temperance Building Society would never have parted with their money without getting from the London and South Western Bank the documents which they held. They regarded them as vital to their security; and as soon as they handed their money to the London and South Western Bank it appears to me that they were entitled to the security which the London and South Western Bank held for the amount which was so paid to them.

The point has been urged on behalf of the appellant by one of his counsel at the very conclusion of his argument that the case is different, because a portion of the security representing £3000 went to the Temperance Building Society and the other representing £600 went to the Nineteenth Century Building Society; and that therefore the loan, which was a single one from the London and South Western Bank, was split up between the two building societies. It is a point raised in the House for the first time; it was not argued in the Court below, and, whatever substance there may be in it, it is in my opinion too

late to raise it now. Therefore, I do not propose to say anything further with regard to it.

For these reasons I think that the judgment appealed from should be affirmed and the appeal dismissed with costs.

LORD WATSON:—

My Lords, the facts of this case are not in dispute, and the principles of law which must be applied to them are to my mind very plain.

A principal employs an agent to raise money on certain securities, and at the same time directs him not to borrow more than a specified sum. The agent goes into the market, and, in exchange for the securities, obtains a loan in excess of the amount prescribed, from a bonâ fide lender who has neither notice nor knowledge of the limitation. The agent, instead of accounting to his principal, applies the excess to his own purposes, and absconds. Does the loss in these circumstances fall upon the principal, or upon the lender?

I entertain no doubt as to the answer which must be made to that question. I think the principal, who gave him the means of committing it, must bear the consequences of his agent's fraud: it appears to me to be just and reasonable that, the agent having the control of the securities, for the purpose of borrowing, with the consent of the principal, a lender, who has no notice to the contrary, should be entitled to deal with him on the footing that he had authority to pledge the securities to the full amount of their value. That such is the rule in equity appears to me to be a corollary from the judgment of Lord Chancellor Cranworth in *Perry-Herrick* v. *Attwood* (1).

The London and South Western Bank, as against their advance of £3500, got the title deeds, and thus obtained an equitable charge not, as was suggested in the appellant's argument, upon the documents of title, but upon the land which they represented. The two companies who are respondents in this appeal advanced the money required to pay the claim of the bank, and the title deeds held in security by the bank were handed over to them. Any equitable interest in the land which had previously pertained

(1) 2 De G. & J. 21.

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to the bank, in respect of its possession of the title-deeds, thus passed to the respondents.

It is true that the agent forged a number of documents, which he delivered to the respondents, and by which he probably induced them to advance their money. The respondents can take no benefit from documents which are tainted with the vice of forgery; but that circumstance can afford no reason for depriving them of any right in security which is not affected by that taint.

I concur in the opinion delivered by the Lord Chancellor, and in the judgment which his Lordship has moved.

LORD MACNAGHTEN:—

My Lords, I entirely agree.

The case is reduced to a very simple proposition. A person places his title-deeds under the control of an agent and instructs the agent verbally to procure for him a certain sum by means of those deeds. The agent then obtains from a banker, on the security of the deeds, an advance in excess of the amount which the principal directed or intended him to raise, and misappropriates the difference. Who is to bear the loss? Is the principal to suffer for the fraud of his agent, or the banker, who, on the invitation of the principal, has dealt in good faith with the agent in the very matter intrusted to his agency? It would seem to be in accordance with common sense that the loss should fall upon the principal. No authority has been produced to the contrary; and the judgment under appeal is in accordance with the principle of the decision in *Perry-Herrick* v. *Attwood* (1), though the facts of the two cases are different. The principle laid down in *Perry-Herrick* v. *Attwood* (1) seems to be this: if a person permits title-deeds, which belong to his security, to be dealt with for the purpose of creating a preferential charge of a definite amount and the limit is exceeded, he cannot, as against innocent third parties who have advanced their money without notice of the limit, complain that the authority which he gave has been exceeded in that respect.

Perry-Herrick v. *Attwood* (1) was not a case of agency, but it

(1) 2 De G. & J. 21.

seems to me that the principle is equally applicable in a case of that sort.

I cannot understand the grounds on which it was argued that the two building societies, whose money went to pay off the charge of the London and South Western Bank, are not entitled to stand in the place of the bank as regards the title-deeds and the security created by the deposit of those deeds.

I think the judgment of the Court of Appeal is right and ought to be affirmed.

LORD MORRIS:—

My Lords, I concur.

Order of the Court of Appeal and judgment of Wright J. affirmed, and appeal dismissed with costs.

Lords' Journals 15th March 1895.

Solicitor for appellant: *G. J. Brocklesby.*
Solicitors for respondents: *Shaen, Roscoe, Massey & Co.*

[HOUSE OF LORDS.]

H. L. (E.) 1895 *March* 19.

MARY DUNCAN WHARTON AND ELIZABETH WARWICK . . . . . } APPELLANTS;

AND

EDWARD MASTERMAN AND OTHERS . RESPONDENTS.

Will—Accumulations—Gift to Charities—Direction to accumulate Surplus Income—Thellusson Act (39 & 40 *Geo.* 3, *c.* 98).

Where there is an absolute vested gift made payable at a future event, with direction to accumulate the income in the meantime and pay it with the principal, the Court will not enforce the trust for accumulation in which no person has any interest but the legatee; in other words the Court holds that a legatee may put an end to an accumulation which is exclusively for his benefit. This is the principle of *Saunders* v. *Vautier* (4 Beav. 115; Cr. & P. 240) and it is as applicable where the legatee is a charity, corporate or unincorporate, as where he is an individual.

Where such an accumulation is directed for more than twenty-one years from the death of the testator and for the above reason is not effective, the Thellusson Act (39 & 40 Geo. 3, c. 98) has no application.

The decision of the Court of Appeal (*Harbin* v. *Masterman*, [1894] 2 Ch. 184) affirmed.

JOHN FRANCIS DUNCAN, by his will dated the 15th of February, 1860, after giving certain legacies bequeathed all the residue of his personal estate (thereinafter called "the said trust monies stocks funds and securities" to trustees upon trust out of the annual income thereof to pay certain annuities with the following proviso:—

"Provided always that in case the annual income of the said trust monies stocks funds and securities shall not be sufficient for the payment of the whole amount of the said annuities, then it is my will and desire and I direct my said trustees or trustee when and as often as the same shall happen to apportion the deficiency between and amongst the said annuitants according to the amount of their respective annuities and so as that the same shall rateably abate accordingly.

"And upon further trust that they my said trustees or trustee do and shall in every year after my decease invest the surplus

income if any of the said trust monies stocks funds and securities, whether such surplus shall arise from the falling in or determination of any annuity or annuities hereinbefore given or otherwise, in their or his names or name in some or one of the public stocks funds or on Government or real securities in England or Wales with power from time to time at their or his discretion to alter vary and transpose such stocks funds and securities in case it shall be advisable to do so into or for others of the same or a like nature. And from and after the decease of the survivor of the said annuitants do and shall sell dispose of and convert into money all such part of the said trust monies stocks funds and securities and the accumulations thereof respectively as shall not actually consist of cash, and stand possessed of the money to arise from such sale disposition and conversion and also of such part of the said trust monies stocks funds and securities and the accumulations thereof respectively as shall consist of actual cash

"In trust to pay and divide the same into the several public charities hereinafter named according to the amounts set after their respective names that is to say—To the treasurer for the time being of an institution known by the name of the London Orphan Asylum for the reception and education of destitute orphans established in London One hundred pounds To the Public Dispensary Carey Street near Lincoln's Inn One hundred pounds To the Royal Free Hospital Gray's Inn Road One hundred pounds To the King's College Hospital in Carey Street Lincoln's Inn One hundred pounds And to an institution called the" [Here was a blank in the will] "under the patronage of the late Lord Mayor of London Alderman Wire the sum of One hundred pounds for the benefit of persons afflicted with paralysis."

The testator died on the 1st of January 1865.

In a suit for the administration of the testator's estate (*Harbin* v. *Masterman* (1)) Wickens V.C. decided (July 12, 1871) on further consideration that the charities were entitled to the residue of the personal estate in equal shares, but declined to stop the accumulations and give them to the charities at once.

(1) L. R. 12 Eq. 559.

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The next of kin (who were not ascertained till 1893) were now represented by the present appellants, who by petition in the suit claimed under the Thellusson Act the accumulations of surplus income from the 1st of January, 1886, being the expiration of twenty-one years from the testator's death.

Stirling J. held that the annuities were payable out of the income (and not capital) of the clear residue of the personal estate of the testator at the time of his death, subject to abatement in case of insufficiency of such income, and without any right on the part of the respective annuitants to resort to the surplus income of any past or future year or the accumulations thereof for the purpose of making up the deficiency in any year or years during the periods for which the annuities were respectively payable, and declared that the charities were entitled in equal shares to the whole of the surplus income (whether arising before or after the 1st of January 1886) of such part of the clear residue as consisted of pure personalty and the accumulations of such surplus income, and also to such part of the funds in Court as represented the said surplus income and the accumulations thereof or the investments thereof, and to have such part of the said funds transferred and paid to them accordingly.

This decision and the decision of Wickens V.C. of the 12th of July 1871 were affirmed by the Court of Appeal (Lindley, Kay, and A. L. Smith L.JJ. (1)) and were complained of in the present appeal against that order of the Court of Appeal.

1894. Nov. 27, 29. *Crackanthorpe* Q.C. and *Hopkinson* Q.C. (*Ribton* with them) for the appellants :—

First, upon the true construction of the will the bequests give the five charities no greater interest in the residuary personal estate than legacies to the amount of £100 each. "According to the amounts set after their respective names" means not "in proportion to" but "as hereinafter stated." Secondly, and assuming that construction to be wrong, the charities are not general residuary legatees in the proper sense of that term, but are legatees of a fund to be formed in part by original investments and in part by accumulations of surplus income, and since

(1) [1894] 2 Ch. 184.

the accumulations are dealt with by the will as separate subjects of gift, distinct from the investments from the income of which they are derived, it follows as regards the accumulations which cease on the 1st of January 1886 by virtue of the Thellusson Act, that the income arising after that date is, in the result, undisposed of and belongs to the appellants who represent the next of kin at the time of the testator's death: Jarman, 5th ed. 281; *Green* v. *Gascoyne* (1); *Weatherall* v. *Thornburgh* (2); *Talbot* v. *Jevers* (3); *Oddie* v. *Brown* (4); *Re Parry* (5); see *Love* v. *L'Estrange.* (6) Moreover the annuities are not charged merely on the annual income; the annuitants are entitled to have the deficiency of any one year's income supplemented out of the accumulations of past or future years.

There is in any case no gift of income to the charities, but at most something to accumulate. The doctrine of *Saunders* v. *Vautier* (7) is inapplicable to charities for the reasons given by Wickens V.C. (8). *Saunders* v. *Vautier* (7) and *Gosling* v. *Gosling* (9) are distinguishable: they were cases of a present and not of a future gift. There is only a gift of accumulations quâ accumulations. But the accumulations were void after 1886, and the void accumulations are therefore undisposed of and go to the next of kin.

Cozens-Hardy Q.C. and *Buckley* Q.C. (*Samuel Dickinson* with them) for the respondents, were not called upon with respect to the first contention of the appellants:—

It is plain on the will that the annuitants have no claim to be secured on the surplus income. The testator does not give in each case an annuity of a fixed amount, but states a maximum which may be reduced if in any year the income is insufficient to pay the maximum. There can be no arrears, as the surplus of each year has to be invested; and there can be no recourse to the surplus of one year to make up the deficiency of another.

(1) 4 D. J. & S. 565.
(2) 8 Ch. D. 261.
(3) L. R. 20 Eq. 255.
(4) 4 De G. & J. 179.
(5) 60 L. T. (N.S.) 489.
(6) 5 Bro. P. C. 59.
(7) 4 Beav. 115; Cr. & P. 240.
(8) L. R. 12 Eq. 559.
(9) Joh. 265.

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The effect of the Thellusson Act is that those will receive who would have received if no illegal accumulations had been directed. The recipients must be the charities for the reasons given by the Court of Appeal. *Saunders* v. *Vautier* (1) applies and the enjoyment by the charities is accelerated. There is no sound reason why a charity should be placed on a different footing from an individual. *Weatherall* v. *Thornburgh* (2) and *Talbot* v. *Jevers* (3) are inapplicable. In *Oddie* v. *Brown* (4) there was no gift at all until £3000 had been accumulated.

Crackanthorpe Q.C. in reply:—

Saunders v. *Vautier* (1) has never been applied to a case in which the legatee is not entitled to the corpus: if the charities are not entitled to the corpus—and they do not claim it—they are not entitled to the produce. *Kearsley* v. *Woodcock* (5) is inconsistent with the respondents' view. The Thellusson Act alters nothing in the will except the direction to accumulate, and as there is nothing in the will to give the unlawful accumulations to the charities, they must go to the next of kin. [He also cited *Hanson* v. *Graham* (6); *Dundas* v. *Wolfe Murray* (7); *Countess of Bective* v. *Hodgson* (8); *Eyre* v. *Marsden* (9); *Elborne* v. *Goode* (10).]

The House took time for consideration.

1895. March 19. LORD HERSCHELL L.C.:—

My Lords, the first question which arises in this case is whether the charities named in the will of John Francis Duncan are entitled (subject to annuities which he thereby created) to the residue of his estate, or only to the sums specified in his will in connection with each of the charities. The ultimate trust of the residue is in these terms. [His Lordship read them.] The matter came before Wickens V.C. for decision in 1871; he held that the charities had made good their claim to be resi-

(1) 4 Beav. 115; Cr. & P. 240.
(2) 8 Ch. D. 261.
(3) L. R. 20 Eq. 255.
(4) 4 De G. & J. 179.
(5) 3 Hare, 185.
(6) 6 Ves. at p. 248.
(7) 1 H. & M. 425.
(8) 10 H. L. C. 656.
(9) 2 Keen, 564.
(10) 14 Sim. 165.

duary legatees of the testator's personal estate, and not merely legatees of five sums of £100 each. The Court of Appeal refused to disturb that finding, and I see no reason to differ from the view hitherto taken.

The trust being to "pay and divide the residue into the several charities hereinafter named according to the amounts set after their respective names," it seems to me impossible to suppose that the testator intended to limit their rights to the specific sums mentioned. The only reasonable construction is, I think, that which has been put upon the clause.

The other questions raised by the next of kin, who are the present appellants, are not so simple. The testator directed the surplus income of his residuary estate, after satisfying the annuities which he provided for, to be accumulated, and after the death of the surviving annuitant he bequeathed the capital and the accumulations upon the trust, the terms of which I have quoted. Some of the annuitants are still living. It is contended for the appellants that they, as next of kin, are entitled to all the accumulations which have accrued subsequently to the period for which under the provisions of Thellusson's Act accumulation could lawfully be directed.

It has first to be determined whether upon the true construction of the will the surplus income accumulated and the interest accruing from these accumulations when invested were charged with the payment of the annuities. This depends, of course, upon the intention of the testator to be derived from the language used in his will. He bequeaths to trustees all the residue of his personal estate, which he thereafter calls "the said trust monies, stocks, funds and securities," and directs them "from and out of the annual income of the said trust moneys, stocks, funds and securities" to pay the annuities which he specifies subject to a proviso in the following terms. [His Lordship read it.]

Having regard to the language used, I do not think it is possible to hold that the annuitants have any claim to be satisfied out of the accumulations of surplus income. But for the provision for abatement it might have been contended (and probably successfully contended) that such a right existed, but it seems to me to be expressly excluded by the abatement clause. It is

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true that there is no provision for the investment of the income derived from the accumulation of the surplus income, unless it be deduced from the use of the word "accumulation" in the clause which precedes the ultimate trust; but, whether this be so or not, I think the income arising from the investment of surplus income must, in the absence of any direction to the contrary, follow the destination of the investments from which it results.

My Lords, for these reasons it appears to me that the charities have a vested interest in the surplus income and the accretions resulting from the investment of that surplus income.

The testator, however, undoubtedly intended to postpone the enjoyment of his bounty by these beneficiaries until the death of the last annuitant. The Courts below have, notwithstanding this, determined that the beneficiaries are entitled to the immediate enjoyment of all that is not made by the will subject to the payment of the annuities. This is, to my mind, the only point of any difficulty. The Courts proceeded on the doctrine acted upon in *Saunders* v. *Vautier* (1), which has been since often recognised.

Wood V.C., in *Gosling* v. *Gosling* (2), expounded the doctrine thus: "The principle of this Court has always been to recognise the right of all persons who attain the age of twenty-one to enter upon the absolute use and enjoyment of the property given to them by a will, notwithstanding any directions by the testator to the effect that they are not to enjoy it until a later age:—unless during the interval the property is given for the benefit of another. If the property is once theirs, it is useless for the testator to attempt to impose any fetter upon their enjoyment of it in full so soon as they attain twenty-one. And upon that principle, unless there is in the will, or in some codicil to it, a clear indication of an intention on the part of the testator not only that his devisees are not to have the enjoyment of the property he has devised to them until they attain twenty-five, but that some other person is to have that enjoyment—or unless the property is so clearly taken away from the devisees up to the time of their attaining twenty-five as to induce the Court to hold that as to

(1) 4 Beav. 115; Cr. & P. 240. (2) Joh. at p. 272.

the previous rents and profits there has been an intestacy—the Court does not hesitate to strike out of the will any direction that the devisees shall not enjoy it in full until they attain the age of twenty-five years."

The point seems, in the first instance, to have been rather assumed than decided. It was apparently regarded as a necessary consequence of the conclusion that a gift had vested, that the enjoyment of it must be immediate on the beneficiary becoming sui juris, and could not be postponed until a later date unless the testator had made some other destination of the income during the intervening period.

It is needless to inquire whether the Courts might have given effect to the intention of the testator in such cases to postpone the enjoyment of his bounty to a time fixed by himself subsequent to the attainment by the objects of his bounty of their majority. The doctrine has been so long settled and so often recognised that it would not be proper now to question it.

Wickens V.C., when this case came before him in 1871, intimated an opinion that the rule in *Saunders* v. *Vautier* (1) was inapplicable where the beneficiaries were charitable corporations or the trustees of charities. I have carefully considered the reasons which he adduced for this opinion with the respect due to any opinion of that learned Judge, and certainly with no indisposition to give effect to the intention of the testator if I could see my way to do so. But I am unable to find any sound basis upon which a distinction can be rested in this respect between bequests to charities and those made in favour of individual beneficiaries.

My Lords, I concur, therefore, in the conclusion at which the Courts below arrived. The Thellusson Act has, in my opinion, for the reasons given, no application to the case.

I think the judgment should be affirmed, and the appeal dismissed with costs.

LORD MACNAGHTEN :—

My Lords, I am of the same opinion. It seems to me that the order of the Court of Appeal is perfectly right.

(1) 4 Beav. 115 ; Cr. & P. 240.

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As regards the construction of the testator's will, I do not think that there is any difficulty. The five charities are clearly the testator's residuary legatees. The gift to them is awkwardly expressed. The awkwardness, however, I think, arises merely from the fact that in the result they are found to take equally, though the will appears to have been prepared with a view to an unequal distribution. It may be that when the instructions for the will were given the testator had not finally determined the shares in which the ultimate objects of his bounty were to take, and that he wished to leave the matter open till the last moment. But however that may be, there is only one result which can be brought out from the language which the testator has used.

Then, I think, the testator's will shews an anxious desire that the annuities should only be paid out of the income accruing from year to year on the corpus or capital of the testator's residuary estate as it subsisted at the time of his death. The intention seems to have been that the accounts should be closed at the end of each year. If there was a deficiency, the annuitants were to bear the loss, and the annuities were to abate rateably. If there was a surplus, the surplus was to be put aside for the benefit of the residuary legatees. Under no circumstances, as it seems to me, were the annuitants to be at liberty to resort to the income of a future year for the purpose of making good a past deficiency. At the same time it is clear on the face of the will that the testator did not mean the residuary legatees to receive any part of what the will gives them until the death of the last annuitant.

Now if the residuary legatees were individuals, there could not be the slightest doubt that they would be entitled to call upon the trustees to hand over to them at the end of each year the surplus income of the testator's residuary estate. Does the fact that the residuary legatees are charities make any difference? Notwithstanding the doubt expressed by Wickens V.C., when the case was before him in 1871, I do not think that it does. The charities alone are interested in the surplus income accruing from year to year. Their interest is vested and indefeasible. And they may legally apply what they take under the bequest either as capital or as income. That being so, I agree with the

reasoning of Stirling J. and the Court of Appeal. In regard to the questions which have arisen on this will, I am unable to see any substantial distinction between the case of an incorporated charity and a charity not incorporated, or between the case of a charity and an individual.

LORD DAVEY (1):—

My Lords, this case arises on the will of a testator named John Francis Duncan, who died on the 1st of January, 1865. The contest is between the conflicting claims of the testator's next of kin and those of five charitable institutions named in his will, to the accumulations of the surplus income of the testator's residuary estate subsequent to the 1st of January, 1886 (being the expiration of twenty-one years from his death), and the accruing surplus income until the death of the surviving annuitant named in the will, and also to the capital of the estate on the expiration of that period. I observe from the proceedings in the suit that two of the annuitants were infants on the 25th of May, 1868; so that, on a moderate estimate of probabilities, the period in question may extend some way into the next century.

The case came originally before Wickens V.C. in the year 1871, and is reported in Law Rep. 12 Eq. 559. At that time, however, the next of kin had not been ascertained, and their present claims were represented by the Crown. The next of kin have since been ascertained, and are the appellants at your Lordships' bar.

The Court of Appeal, affirming the judgment of Stirling J., have decided: (1.) That the five charities are entitled to, and, when the charge of the annuitants on the income has run off, will be able to receive, the corpus of the residuary estate; (2.) That the annuities are charged only on the annual income of the estate de anno in annum, and that the annuitants have no right to have the deficiency of the income of any one year to pay their annuities made good out of the accumulations of the surplus income of past years; (3.) That the surplus income of each year is given away to other objects free from any claim by

(1) Lord Davey being unavoidably absent, this judgment was read by Lord Watson.

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the annuitants; (4.) That what is known as the rule in *Saunders* v. *Vautier* (1) is as applicable where the donees or legatees are charities as where they are individuals.

On the first point your Lordships did not think it necessary to call upon the counsel for the respondents. All the judges before whom this case has come, including the late Vice-Chancellor Wickens, have held that the will contains a gift of the capital of the estate to the charities, and that they are not confined to £100 per annum. I agree in that conclusion, and I have really nothing to add to the reasons given in the Courts below and what has been said by your Lordships.

The next point is also one of construction. The testator gives the residue of his personal estate to trustees upon trust, either to permit the said residue, thereinafter called "the said trust monies, stocks, funds and securities," to remain in the state of investment in which the same might be at the time of his death, but, if absolutely necessary, to vary the same, or any part thereof, into or for others of the same or a like nature. I agree with the argument of the respondents, that the trust fund so constituted consists only of the capital funds which formed the residue of his estate as at the time of the testator's death, and does not include any subsequent income or income of accumulations.

The testator then declares the trusts of the annual income of his "said trust monies, stocks, funds and securities," first to pay a legacy of £100, then to pay an annuity of £500 to his wife during her life, by half-yearly payments, the first of such payments to be made six months after his decease (shewing that it is the income of the estate from his death that he is dealing with), and another annuity of £50. And then he directs that after his decease the following annuities be paid, and names a number of annuitants. Pausing there, it might be contended, consistently with well-known authorities, that the annuities are charged upon the capital, or at any rate upon the income of every year until they are satisfied. But then comes the abatement clause, which it is unnecessary to read again. This clause points to a recurring deficiency "when and so often as the same

(1) 4 Beav. 115; Cr. & P. 240.

shall happen," and it appears to me to negative any charge upon the corpus of the estate, or upon any surplus income of past years, or right to resort to the accumulations of such surplus income to make good the deficiency in any year. Whether it does not also negative any right to resort to the income of any future year to make up the deficiency of past years it is immaterial to consider, as it would only affect the amount of what is called the "surplus income," and the question does not arise.

The will then proceeds in these words: "And upon further trust that they my said trustees or trustee do and shall in every year after my decease invest the surplus income (if any) of the said trust monies, stocks, funds and securities, whether such surplus shall arise from the falling in or determination of any annuity or otherwise." After the decease of the survivor of the annuitants he directs a sale of such part of the trust moneys, stocks, funds and securities, and the accumulations thereof, as shall not consist of cash, and gives the proceeds, and also such part of the said trust moneys, &c., and the accumulations thereof, as shall consist of cash upon trusts which, as I have said, import a gift to the charities.

In this will I am of opinion that the testator has carefully confined the rights of the annuitants to the annual income accruing de anno in annum of his capital residuary estate, and has dealt with the surplus income in each year, as it accrued, upon different trusts, and as a distinct subject of gift. It is said that the will contains no direction to invest the income of the investments of the surplus income. There is no express direction, but, in my opinion, there is an implied direction, to be found as well in the use of the word "accumulations," which, in this connection, imports a continuous process of rolling up, as in the general rule of equity, which imposes upon trustees the duty of investing trust funds in their hands of which the testator has not directed an immediate disposition. And I think that the accumulations comprise the whole fund created by the investment and re-investment by way of compound interest of the surplus income and the income derived from it. It is, however, suggested at the Bar that the income of investments of surplus income falls back into the original trust fund and follows the

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destination of the income of it, and is therefore subject to a trust for the annuitants. In my opinion, this is not so. When there is no express trust declared of the income of a trust fund, it follows the destination of, and is an accretion to, the fund from which it is derived (unless there be words excluding that implication). But the source of the income in question is the investments of the surplus income; so that even if it be not impliedly given by force of the term "accumulations," it would go in the same way as the investments of the surplus income, i.e. to the charities.

I am, therefore, of opinion that the annuitants have no charge upon the surplus income, or the investments of it, or the income derived from such investments, all of which, I think, are included in the accumulations, and the charities have a vested title free from any claim by any other person to the surplus income; but according to the directions of the will, their enjoyment is postponed to the death of the survivor of the annuitants, and an accumulation is directed in the meantime.

This being so, the principle of *Saunders* v. *Vautier* (1) would at once be applicable if this were the case of a gift to an individual. That principle is this: that where there is an absolute vested gift made payable at a future event, with direction to accumulate the income in the meantime, and pay it with the principal, the Court will not enforce the trust for accumulation in which no person has any interest but the legatee, or (in other words) the Court holds that a legatee may put an end to an accumulation which is exclusively for his benefit. The principle is stated, as well as elsewhere, by Lord Hatherley in the passage from his judgment in *Gosling* v. *Gosling* (2) which was read by Lindley L.J. in the Court of Appeal. There is no condition precedent to happen or to be performed in order to perfect the title of the legatees, and there is no other person who has any interest in the execution of the trust for accumulation, or who can complain of its non-execution. The reason for the rule has been variously stated. It may be observed, however, that the Court of Chancery always leant against the postponement of vesting or possession, or the im-

(1) 4 Beav. 115; Cr. & P. 240.

(2) Joh. at p. 272; and see per Lord Herschell, at p. 192 above.

position of restrictions on the enjoyment of an absolute vested interest.

But it is said that there is a difference in the case of charities; and although there is no authority on the point, the late Wickens V.C. expressed some doubt upon it when it came before him in the year 1871. What he said was this: "But having regard to the frame of the will, though the annuities are amply secured, I do not think I can order a division of the fund at present. If the residuary legatees were five individuals, I should probably do so, there being nothing in the Thellusson Act to prevent it. But the legatees being charities, am I entitled to stop the accumulations? If a sum of money be given to be accumulated, say, for ten years, and then to a charity, is the charity, whether incorporate or unincorporate, entitled to claim the money at once? There may be sound reasons for deferring the enjoyment. A testator may think that the charity has a certain provision during the present generation of subscribers, and that it will not want any additional provision. And it is obvious that, though the charity remains the same, yet, if the gift is to take effect ten years hence, a different class of persons will be benefited. It does not appear that all these charities have perpetual existence, but the distinction between an incorporated and unincorporated charity is, I think, too refined to be relied upon" (1).

Your Lordships will, I am sure, regard any dictum, or even doubt, expressed by Wickens V.C. on a subject of this kind with the greatest respect and attention. But I must confess that I do not, on the fullest consideration, find sufficient grounds for the Vice-Chancellor's doubt. It is easy, of course, to speculate on the testator's motives in postponing enjoyment of a vested interest, and it is at least as easy to suggest motives for such a direction in the case of an individual as in the case of a charity. Nor can the possible difference in the actual recipients of the testator's bounty make any distinction. An individual may die, or become bankrupt, during the period of accumulation. It is difficult to attribute to the testator a particular regard for the objects of the charity—it may be in the middle of the next

(1) L. R. 12 Eq. at p. 564.

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century — or respect for the persons who may then be the trustees or managers of the charity. And I think it unsound to make the application of a canon of construction as to the effect of particular words in a will dependent on circumstances affecting the quality or character of the donee. It will be observed that in the present case the gift is to each charity in a form which would enable the managers to spend the amount as income, or deal with it as they might think fit. We have not to deal with a fund to be created by accumulations and settled as a capital endowment at a future time, as to which different considerations would arise.

I am, therefore, of opinion that there is no effective direction for accumulation of any part of the surplus income in this will, and, therefore, the Thellusson Act has no application to it, and the judgment of the Court of Appeal should be affirmed. The appellants' counsel indeed argued that the charities might be entitled during the twenty-one years from the testator's death, but in consequence of the Thellusson Act the subsequent surplus income was undisposed of. I find a difficulty in grasping the argument, because the Thellusson Act does not give anything to anybody, but merely vitiates the direction for accumulation beyond the prescribed period. But the conclusive answer is that if there is no effective or enforceable direction for accumulation independently of the Act, then the Act has no application to the case.

The cases cited by Mr. Crackanthorpe do not seem to me to support his argument. They are cases in which the class could not be determined until the happening of the event upon which the fund was made payable, as in *Green* v. *Gascoyne* (1); or the shares of the legatees, though vested, were liable to be defeated by the happening of some event before the time for payment, as in *Eyre* v. *Marsden* (2); or the gift itself was contingent upon the happening of an event (such as the death of a person without male issue), as in *M'Donald* v. *Bryce* (3). In the case of *Weatherall* v. *Thornburgh* (4) the fund and accumulations were made a security for the payment of certain legacies on the

(1) 4 D. J. & S. 565.
(2) 2 Keen, 564.
(3) 2 Keen, 276.
(4) 8 Ch. D. 261.

happening of the given event, and the persons claiming were, therefore, only entitled to an undetermined and uncertain surplus (if any) which might be left of the fund after payment of the legacies. This is the ground stated by Cotton L.J. and, I think, by James L.J. also. In *Talbot* v. *Jevers* (1) the annuities were clearly charged by the words of the will on the whole estate, capital, and income, and the accumulation was directed only for a stated period, "or so much of it as the law will allow." There was, therefore, on the face of the will no disposition of the intermediate surplus income after the expiration of the twenty-one years. The doctrine of *Saunders* v. *Vautier* (2) did not apply, because the annuitants had an interest in the income, and according to the scheme of the will the residuary legatees could not take it except in the form of accumulations. I think the decision of Bacon V.C. can be supported on this ground.

In the view which I take of the case it is unnecessary to express any opinion on the point which was argued by Mr. Buckley, that even if the annuitants had a charge on the income derived from investments of the surplus income, and the doctrine of *Saunders* v. *Vautier* (2) were therefore excluded, the charities would still be entitled to the surplus income after the expiration of twenty-one years, under the words of the Thellusson Act.

I agree with your Lordships that the appeal should be dismissed with costs.

Orders of the Court of Appeal, of Wickens V.C. and Stirling J., affirmed and appeal dismissed with costs.

Lords' Journals 19th March 1895.

Solicitors for appellants: *Hood Barrs & Co.*
Solicitors for respondents: *Winter & Co.*

(1) L. R. 20 Eq. 255. (2) 4 Beav. 115; Cr. & P. 240.

[PRIVY COUNCIL.]

J. C.* 1894 Dec. 11, 12, 13. 1895 Jan. 29.

BROPHY AND OTHERS . . . . . APPELLANTS;

AND

THE ATTORNEY-GENERAL OF MANITOBA . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Law of Canada—Province of Manitoba—Dominion Statute, 33 *Vict.* c. 3, *s.* 22, *sub-ss.* 2, 3—*Manitoba Public Schools Act*, 1890—*Appeal to the Governor-General in Council—Remedies against Provincial Legislation.*

Where the Roman Catholic minority of Manitoba appealed to the Governor-General in Council against the Manitoba Education Acts of 1890, on the ground that their rights and privileges in relation to education had been affected thereby :—

Held, reversing the judgment of the Supreme Court on a case submitted to it :

(*a*) That such appeal lay under sect. 22, sub-sect. 2, of the Manitoba Act, 1870, which applies to rights and privileges acquired by legislation in the province after the date thereof.

(*b*) That the Roman Catholics having acquired by such legislation the right to control and manage their denominational schools, to have them maintained out of the general taxation of the province, to select books for their use, and to determine the character of the religious teaching therein, were affected as regards that right by the Acts of 1890, under which State aid was withdrawn from their schools, while they themselves remained liable to local assessment in support of non-sectarian schools to which they conscientiously objected.

(*c*) That the Governor-General in Council has power to make remedial orders in the premises within the scope of sub-sect. 3 of sect. 22—*e.g.*, by supplemental rather than repealing legislation.

APPEAL, by special leave, from a decree of the Supreme Court (Feb. 20, 1894), upon a case referred thereto by the Governor-General in Council, for hearing and consideration pursuant to the Supreme and Exchequer Courts (Revised Stat. Can. c. 135) as amended by Dominion Act, 54 & 55 Vict. c. 25, s. 4.

* *Present*:—THE LORD CHANCELLOR, LORD WATSON, LORD MACNAGHTEN, and LORD SHAND.

The substantial questions submitted by that case were (1.) whether any appeal lay to the Governor-General in Council from two statutes passed by the Legislature of Manitoba in the year 1890, being 53 Vict. c. 37, and the Public Schools Act 1890, whereby a general system of non-sectarian public education was established in the place of the denominational system that had previously existed; (2.) whether the Governor-General in Council had power to make the declarations or remedial orders which were asked for in certain memorials that had been presented to him.

The memorialists complained that their rights and privileges in relation to education had been affected by the two statutes before mentioned, and asked for a declaration that such rights and privileges had been prejudicially affected thereby; and that the Governor-General in Council should give such directions and make such remedial orders for the relief of the Roman Catholics of the Province of Manitoba as to His Excellency in Council might seem fit.

The Supreme Court of Canada (Strong C.J., Fournier, Taschereau, Gwynne, and King JJ.) after argument decided by a majority that no such appeal lay from the said statutes: Strong C.J., and Taschereau and Gwynne JJ. held that no appeal lay, and that the Governor-General in Council had not the power to make the orders asked for: Fournier and King JJ. were of the contrary opinion.

Manitoba joined the Union in 1870, upon the terms of the Manitoba Act, 33 Vict. c. 3 (Dominion Statute), which Act was declared valid and effectual by the British North America Act, 1871, 34 & 35 Vict. c. 28, s. 5. The questions submitted turned upon the construction of sects. 2 and 22 of the Manitoba Act, and sect. 93, sub-sect. 3, of the British North America Act, 1867.

Sect. 2 of the Manitoba Act, 1870, is as follows:

"2. On and after the said day on which the order of the Queen in Council shall take effect as aforesaid, the provisions of the British North America Act, 1867, shall, except those parts which are in terms made or by reasonable intendment may be held to be specially applicable to or only to affect one or more but not the whole of the provinces now composing the Dominion, and

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except so far as the same may be varied by this Act, be applicable to the Province of Manitoba in the same way and to the same extent as they apply to the several Provinces of Canada, and as if the Province of Manitoba had been one of the provinces originally united by the said Act."

Sect. 22 of the Act is as follows:

"In and for the Province, the said Legislature may exclusively make laws in relation to education, subject and according to the following provisions:—

"(1.) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law or practice in the Province at the Union.

"(2.) An appeal shall lie to the Governor-General in Council from any Act or decision of the Legislature of the Province, or of any provincial authority, affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education.

"(3.) In case any such provincial law as from time to time seems to the Governor-General in Council requisite for the due execution of the provisions of this section is not made, or in case any decision of the Governor-General in Council on any appeal under this section is not duly executed by the proper provincial authority in that behalf, then, and in every such case and as far only as the circumstances of each case require, the Parliament of Canada may make remedial laws for the due execution of the provisions of this section, and of any decision of the Governor-General in Council under this section."

Sect. 93 of the British North America Act, 1867, is—

"In and for each Province the Legislature may exclusively make laws in relation to education, subject and according to the following provisions:—

"(1) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools, which any class of persons have by law in the Province at the Union....

"(3.) Where in any province a system of separate or dissentient schools exists by law at the Union, or is thereafter

established by the Legislature of the Province, an appeal shall lie to the Governor-General in Council from any act or decision of any provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education."

In submitting the case referred to the Supreme Court the Governor-General in Council set forth the evidence in two cases called *Barrett's Case* and *Logan's Case* (1), the effect of which is stated in the judgment of their Lordships therein. The following is a short summary thereof:—

At the time when Manitoba was admitted to the Union there was no law or regulation or ordinance with respect to education in force. There were no public schools in the sense of State schools, but there existed throughout the Province a number of denominational schools maintained by school fees or voluntary contributions, and conducted according to the tenets of the religious body to which they might belong. These schools were neither supported by grants from the public funds, nor were any of them in any way regulated or controlled by any public officials. In 1871, however, the year after the admission of Manitoba to the Union, a law was passed which established throughout the Province a system of denominational education in the common schools, as they were then called. A Board of Education was formed, which was to be divided into two sections—Protestant and Roman Catholic. Each section was to have under its control and management the discipline of the schools of the section. Each of the twenty-four electoral divisions into which the Province had by the Manitoba Act been divided was constituted a school district in the first instance, and there was to be a school in each district. Twelve electoral divisions "comprising mainly a Protestant population" were to be considered Protestant school districts; twelve "comprising mainly a Roman Catholic population" were to be considered Roman Catholic school districts. These schools were to be maintained by grants from the public funds, to be divided equally between the Protestant and Roman Catholic schools, and contributions from the people of each school district. Such

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contributions might be raised by an assessment on the property of the school district.

The laws relating to education were modified from time to time. From the year 1876 to 1890 enactments were in force declaring that in no case should a Protestant ratepayer be obliged to pay for a Roman Catholic school, or a Roman Catholic ratepayer for a Protestant school, and by an Act passed in 1881 it was provided that the legislative grant should no longer be divided equally between Protestant and Roman Catholic schools, but should be divided between the Protestant and Roman Catholic section of the Board in proportion to the number of children between the ages of five and fifteen residing in the various Protestant and Roman Catholic school districts.

The system of denominational education was maintained in full vigour until 1890, when the statutes complained of by the appellants were passed. One of them established in the place of the Board of Education a Department of Education, and a board consisting of seven members, known as the "Advisory Board."

The Public Schools Act, 1890, repealed all previous legislation relating to public education, and enacted that all Protestant and Roman Catholic school districts should be subject to the provisions of the Act, and that all public schools should be free schools. At the option of the school trustees for each district, religious exercises conducted according to the regulations of the Advisory Board and at the times prescribed by the Act were to be held in the public schools. The religious services were to be entirely non-sectarian, and any pupil whose parent or guardian should so wish was to be dismissed from school before the religious exercises should take place.

The Act then provided for the formation, alteration, and union of school districts, for the election of school trustees, and for levying a rate on the taxable property in each school district for school purposes. A portion of the legislative grant for educational purposes was allotted to public schools, but no school was to participate in the grant unless it were conducted according to all the provisions of the Act and the regulations of the Department of Education and of the Advisory Board.

E. Blake, Q.C., and *J. S. Ewart, Q.C.*, of the Canadian Bar, for the appellants, who represented the Roman Catholic minority of the Queen's subjects in the Province of Manitoba, contended (1.) that the appeal was admissible; (2.) that the Governor-General in Council could and ought to have given appropriate relief. In *Barrett's* and *Logan's Cases* (1) the validity of the Public Schools Act, 1890, was assailed as ultra vires having regard to sect. 22, sub-sect. 1 of the Manitoba Act, 1870. Here its validity is assumed, but it is contended that an appeal lies to the Governor-General in Council to rectify its provisions as transgressing the restrictions contained in sub-sect. 2, which sub-section is in harmony with sub-sect. 3 of sect. 93 of the Imperial Act of 1867. There are several marked distinctions of the same character between sub-sects. 1 and 2 of the Manitoba Act, and also between sub-sects. 1 and 3 of sect. 93 of the Act of 1867. They shew that sub-sect. 1 of each section relates to a different class of cases and to a different condition of things from that dealt with by the later sub-section. For example, sub-sect. 1 of the Manitoba Act refers to a right or privilege with respect to denominational schools of any class of persons, whether constituting a majority of the population or not, existing by law or practice at the date of the Union, and to cases in which such right has been prejudicially affected. Sub-sect. 2, on the other hand, refers to a right or privilege in relation to education of a particular class, namely, a Protestant or Roman Catholic minority, whether existing at the date of the Union or created thereafter, and to cases in which such right has been affected in any way, including cases in which the relative status was altered, even though the actual position of the minority was not changed for the worse. The cases, therefore, are broadly distinguished in which, on the one hand, legislation is void as ultra vires, and in which, on the other, legislation though intra vires yet affects the rights and privileges of a class. In the former case no appeal is required. Any one aggrieved can successfully resist its application. In the latter an appeal of the kind refused by the Supreme Court is requisite, appropriate, and useful as leading to redress by supplemental corrections of

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the Acts impugned. In this case the Manitoba Education Acts passed prior to 1890 confirmed and continued to the minority a right or privilege in relation to education within the meaning of sub-sect. 2 of the Manitoba Act. They also established a system of separate or dissentient schools within the meaning of sub-sect. 2 of the Act of 1867, sect. 93. The provisions of the Manitoba Acts of 1890 did, on the contrary, affect a right and privilege of the minority in such sort that an appeal for redress lay to the Governor-General in Council. As regards sub-sect. 3 of sect. 93 of the Act of 1867, it applies on its true construction to Manitoba, for the general object of that Act was to put all the provinces at whatever date they entered the confederation as nearly as possible on the same footing. The Manitoba Act does not restrict the Act of 1867 while making it applicable in a general way; it was contended that its terms are even wider than those of the earlier Act. It was not sought in this appeal for any declaration as to the extent of the relief to be granted by the Governor-General; a ruling was desired that he had jurisdiction to hear the prayer of the petition and to grant appropriate relief.

Cozens-Hardy, Q.C., *Haldane*, Q.C., and *Bray*, for the respondent, contended that the Supreme Court decided rightly. Laws in relation to education are within the powers of the provincial legislature. As regards the Manitoba legislature, those powers are completely defined by sect. 22 of the Manitoba Act. Those powers are not limited, extended, or in any way affected by sect. 93 of the British North America Act, 1867. As regards sub-sect. 3 of sect. 93, assuming it applies just as it stands to Manitoba, it was contended that this appeal did not lie thereunder. The appeal allowed by that sub-section was an appeal from an "Act or decision of any provincial authority." The statutes complained of, namely, the Acts of 1890, are not Acts or decisions of a provincial authority within the meaning of that section, which points rather to executive and judicial than to legislative authority; and, in the second place, there is not and there never has been a system of separate or dissentient schools established by law in Manitoba.

But that sub-section 3 has been varied by sub-sect. 2 of sect. 22 of the Manitoba Act. It therefore does not apply, by virtue of sect. 2 of that Act. The position is this: sub-sect. 1 exhaustively defines the limits set to provincial legislative authority. Sub-sect. 2 contains more general provisions, which should be read as consistent with and not as cutting down the language of sub-sect. 1. There is no inconsistency between those sub-sections, and the latter should be so construed as to leave the former as fully operative as if it had stood alone. Accordingly, under sect. 22, an appeal to the Governor-General only lies when rights or privileges existing by law or practice at the Union have been affected. The decisions in *Barrett's* and *Logan's Cases* (1) are conclusive that such privileges have not been infringed. On the contrary view contended for by the appellants, assuming that rights and privileges created since the Union are within the meaning of sect. 22, still the Acts of 1890 have not affected any right or privilege of the Roman Catholic minority in relation to education established by law or practice since that time. The main effect of that legislation was that all public schools should be free schools; that all districts, whether Roman Catholic or Protestant, should be subject to its provisions. Certain non-sectarian religious exercises were to be held in the public schools at the option of the school trustees. Pupils might withdraw before this took place. No school which infringed those regulations would participate in the grant. All denominations were therefore placed on an equal footing; their special teaching was impartially excluded from within the schools, and impartially permitted without the schools. The Acts between 1871 and 1890 did not give any vested right or privilege at all to the minority in relation to education; only contingent and conditional rights and privileges of exemption from the system thereby established. No doubt the Acts of 1890 repealed all previous legislation with regard to education. If any appeal lay on that ground, it would be tantamount to denying the right inherent in all legislatures of repealing or altering its own legislation. It would reduce the provincial power of legislation to a nullity if the Governor-General in Council should be held

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to possess an arbitrary jurisdiction to review and rescind at his discretion, and without any reference to the constitutional right of the province of Manitoba, any Acts of its legislature, notwithstanding that they are intra vires and constitutional.

Blake, Q.C., replied.

1895. Jan. 29. The judgment of their Lordships was delivered by

THE LORD CHANCELLOR:—

In the year 1890 two Acts were passed by the legislature of Manitoba relating to education. One of these created a Department of Education and an "Advisory Board." The board was to consist of seven members, four of whom were to be appointed by the Department of Education, two to be elected by the public and high school teachers of the Province, and one to be appointed by the University Council. The Advisory Board were empowered (amongst other things) to authorize text books for the use of pupils and to prescribe the form of religious exercises to be used in schools.

The other Act, which was termed "The Public Schools Act," established a system of public education "entirely non-sectarian," no religious exercises being allowed except those conducted according to the regulations of the Advisory Board. It will be necessary hereafter to refer somewhat more in detail to the provisions of this Act.

The Act came into force on the 1st of May, 1890. By virtue of its provisions, bye-laws were made by the municipal corporation of Winnipeg, under which a rate was to be levied upon Protestant and Roman Catholic ratepayers alike for school purposes. An application was thereupon made to the Court of Queen's Bench of Manitoba to quash these bye-laws on the ground that the Public Schools Act, 1890, was ultra vires of the Provincial Legislature, inasmuch as it prejudicially affected a right or privilege with respect to denominational schools which the Roman Catholics had by law or practice in the Province at the Union. The Court of Queen's Bench refused the application,

being of opinion that the Act was intra vires. The Supreme Court of Canada took a different view; but upon appeal this Board reversed their decision and restored the judgment of the Court of Queen's Bench.

Memorials and petitions were afterwards presented to the Governor-General in Council on behalf of the Roman Catholic minority of Manitoba by way of appeal against the Education Acts of 1890. These memorials and petitions having been taken into consideration, a case in relation thereto was in pursuance of the provisions of the Supreme and Exchequer Courts Act referred by the Governor-General in Council to the Supreme Court of Canada. The questions referred for hearing and consideration were the following :—

"(1.) Is the appeal referred to in the said memorials and petitions, and asserted thereby, such an appeal as is admissible by sub-sect. 3 of sect. 93 of the British North America Act, 1867, or by sub-sect. 2 of sect. 22 of the Manitoba Act, 33 Vict. c. 3, Canada?

"(2.) Are the grounds set forth in the petitions and memorials such as may be the subject of appeal under the authority of the sub-sections above referred to, or either of them?

"(3.) Does the decision of the Judicial Committee of the Privy Council in the cases of *Barrett* v. *The City of Winnipeg* (1) and *Logan* v. *The City of Winnipeg* (1) dispose of or conclude the application for redress based on the contention that the rights of the Roman Catholic minority which accrued to them after the Union under the statutes of the Province have been interfered with by the two statutes of 1890 complained of in the said petitions and memorials?

"(4.) Does sub-sect. 3 of sect. 93 of the British North America Act, 1867, apply to Manitoba?

"(5.) Has His Excellency the Governor-General in Council power to make the declarations or remedial orders which are asked for in the said memorials and petitions, assuming the material facts to be as stated therein, or has His Excellency the Governor-General in Council any other jurisdiction in the premises?

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"(6.) Did the Acts of Manitoba relating to education, passed prior to the session of 1890, confer on or continue to the minority 'a right or privilege in relation to education' within the meaning of sub-sect. 2 of sect. 22 of the Manitoba Act, or establish a system of separate or dissentient schools 'within the meaning of sub-sect. 3 of sect. 93 of the British North America Act, 1867,' if said sect. 93 be found applicable to Manitoba; and if so, did the two Acts of 1890 complained of, or either of them, affect any right or privilege of the minority in such a manner that an appeal will lie thereunder to the Governor-General in Council?"

The learned judges of the Supreme Court were divided in opinion upon each of the questions submitted. They were all, however, by a majority of three judges out of five, answered in the negative.

The appeal to the Governor-General in Council was founded upon the 22nd section of the Manitoba Act, 1870, and the 93rd section of the British North America Act, 1867. By the former of these statutes (which was confirmed and declared to be valid and effectual by an Imperial statute) Manitoba was created a province of the Dominion.

The 2nd section of the Manitoba Act enacts that after the prescribed day the British North America Act shall "except those parts thereof which are in terms made or by reasonable intendment may be held to be specially applicable to or only to affect one or more but not the whole of the provinces now composing the Dominion, and except so far as the same may be varied by this Act, be applicable to the Province of Manitoba in the same way and to the like extent as they apply to the several provinces of Canada, and as if the Province of Manitoba had been one of the provinces originally united by the said Act." It cannot be questioned therefore that sect. 93 of the British North America Act (save such parts of it as are specially applicable to some only of the provinces of which the Dominion was in 1870 composed) is made applicable to the Province of Manitoba, except in so far as it is varied by the Manitoba Act. The 22nd section of that statute deals with the same subject-matter as sect. 93 of the British North America Act. The 2nd sub-section of this latter section may be discarded from consideration,

as it is manifestly applicable only to the Provinces of Ontario and Quebec. The remaining provisions closely correspond with those of sect. 22 of the Manitoba Act. The only difference between the introductory part and the 1st sub-section of the two sections, is that in the Manitoba Act the words "or practice" are added after the word "law" in the 1st sub-section. The 3rd sub-section of sect. 22 of the Manitoba Act is identical with the 4th sub-section of sect. 93 of the British North America Act. The 2nd and 3rd sub-sections respectively are the same, except that in the 2nd sub-section of the Manitoba Act the words "of the Legislature of the province or" are inserted before the words "any provincial authority," and that the 3rd sub-section of the British North America Act commences with the words: "Where in any province a system of separate or dissentient schools exists by law at the Union or is thereafter established by the Legislature of the province." In view of this comparison it appears to their Lordships impossible to come to any other conclusion than that the 22nd section of the Manitoba Act was intended to be a substitute for the 93rd section of the British North America Act. Obviously all that was intended to be identical had been repeated, and in so far as the provisions of the Manitoba Act differ from those of the earlier statute they must be regarded as indicating the variations from those provisions intended to be introduced in the Province of Manitoba.

In their Lordships' opinion, therefore, it is the 22nd section of the Manitoba Act which has to be construed in the present case, though it is of course legitimate to consider the terms of the earlier Act, and to take advantage of any assistance they may afford in the construction of enactments with which they so closely correspond and which have been substituted for them.

Before entering upon a critical examination of the important section of the Manitoba Act, it will be convenient to state the circumstances under which that Act was passed, and also the exact scope of the decision of this Board in the case of *Barrett* v. *The City of Winnipeg* (1), which seems to have given rise to some misapprehension. In 1867 the union of the Provinces of Canada, Nova Scotia, and New Brunswick took place. Among

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the obstacles which had to be overcome in order to bring about that union, none perhaps presented greater difficulty than the differences of opinion which existed with regard to the question of education. It had been the subject of much controversy in Upper and Lower Canada. In Upper Canada a general system of undenominational education had been established, but with provision for separate schools to supply the wants of the Catholic inhabitants of that province. The 2nd sub-section of sect. 93 of the British North American Act extended all the powers, privileges, and duties which were then by law conferred and imposed in Upper Canada on the separate schools and school trustees of the Roman Catholic inhabitants of that province to the dissentient schools of the Protestant and Roman Catholic inhabitants of Quebec. There can be no doubt that the views of the Roman Catholic inhabitants of Quebec and Ontario with regard to education were shared by the members of the same communion in the territory which afterwards became the Province of Manitoba. They regarded it as essential that the education of their children should be in accordance with the teaching of their Church, and considered that such an education could not be obtained in public schools designed for all the members of the community alike, whatever their creed, but could only be secured in schools conducted under the influence and guidance of the authorities of their Church. At the time when the Province of Manitoba became part of the Dominion of Canada, the Roman Catholic and Protestant populations in the province were about equal in number. Prior to that time there did not exist in the territory then incorporated any public system of education. The several religious denominations had established such schools as they thought fit, and maintained them by means of funds voluntarily contributed by the members of their own communion. None of them received any State aid.

The terms upon which Manitoba was to become a province of the Dominion were matter of negotiation between representatives of the inhabitants of Manitoba and of the Dominion Government. The terms agreed upon, so far as education was concerned, must be taken to be embodied in the 22nd section of the Act of 1870. Their Lordships do not think that anything is to be gained by

the inquiry how far the provisions of this section placed the Province of Manitoba in a different position from the other provinces, or whether it was one more or less advantageous. There can be no presumption as to the extent to which a variation was intended. This can only be determined by construing the words of the section according to their natural signification.

Among the very first measures passed by the Legislature of Manitoba was an Act to establish a system of education in the Province. The provisions of that Act will require examination. It is sufficient for the present to say that the system established was distinctly denominational. This system, with some modifications of the original scheme, the fruit of later legislation, remained in force until it was put an end to by the Acts which have given rise to the present controversy.

In *Barrett's Case* (1), the sole question raised was whether the Public Schools Act of 1890 prejudicially affected any right or privilege which the Roman Catholics by law or practice had in the province *at the Union*. Their Lordships arrived at the conclusion that this question must be answered in the negative. The only right or privilege which the Roman Catholics then possessed, either by law or in practice, was the right or privilege of establishing and maintaining for the use of members of their own Church such schools as they pleased. It appeared to their Lordships that this right or privilege remained untouched, and therefore could not be said to be affected by the legislation of 1890. It was not doubted that the object of the 1st sub-section of sect. 22 was to afford protection to denominational schools, or that it was proper to have regard to the intent of the Legislature and the surrounding circumstances in interpreting the enactment. But the question which had to be determined was the true construction of the language used. The function of a tribunal is limited to construing the words employed; it is not justified in forcing into them a meaning which they cannot reasonably bear. Its duty is to interpret, not to enact. It is true that the construction put by this Board upon the 1st sub-section reduced within very narrow limits the protection afforded by that sub-section in respect of denominational schools. It

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may be that those who were acting on behalf of the Roman Catholic community in Manitoba, and those who either framed or assented to the wording of that enactment, were under the impression that its scope was wider, and that it afforded protection greater than their Lordships held to be the case. But such considerations cannot properly influence the judgment of those who have judicially to interpret a statute. The question is, not what may be supposed to have been intended, but what has been said. More complete effect might in some cases be given to the intentions of the Legislature, if violence were done to the language in which their legislation has taken shape; but such a course would on the whole be quite as likely to defeat as to further the object which was in view. Whilst, however, it is necessary to resist any temptation to deviate from sound rules of construction in the hope of more completely satisfying the intention of the Legislature, it is quite legitimate where more than one construction of a statute is possible, to select that one which will best carry out what appears from the general scope of the legislation and the surrounding circumstances to have been its intention.

With these preliminary observations their Lordships proceed to consider the terms of the 2nd and 3rd sub-sections of sect. 22 of the Act of 1870, upon the construction of which the questions submitted chiefly depend. For the reasons which have been given their Lordships concur with the majority of the Supreme Court in thinking that the main issues are not in any way concluded either by the decision in *Barrett's Case* (1) or by any principles involved in that decision.

At the outset this question presents itself. Are the 2nd and 3rd sub-sections, as contended by the respondent, and affirmed by some of the Judges of the Supreme Court, designed only to enforce the prohibition contained in the 1st sub-section? The arguments against this contention appear to their Lordships conclusive. In the first place that sub-section needs no further provision to enforce it. It imposes a limitation on the legislative powers conferred. Any enactment contravening its provisions is beyond the competency of the Provincial Legislature, and there-

(1) [1892] A. C. 445.

fore null and void. It was so decided by this Board in *Barrett's Case* (1). A doubt was there suggested whether that appeal was competent, in consequence of the provisions of the 2nd sub-section, but their Lordships were satisfied that the provisions of sub-sects. 2 and 3 did not "operate to withdraw such a question as that involved in the case from the jurisdiction of the ordinary tribunals of the country." It is hardly necessary to point out how improbable it is that it should have been intended to give a concurrent remedy by appeal to the Governor-General in Council. The inconveniences and difficulties likely to arise, if this double remedy were open, are obvious. If for example the Supreme Court of Canada, and this Committee on Appeal, declared an enactment of the Legislature of Manitoba relating to education to be intra vires, and the Governor-General in Council on an appeal to him considered it ultra vires, what would happen? If the Provincial Legislature declined to yield to his view, as would almost certainly and most naturally be the case, recourse could only be had to the Parliament of the Dominion. But the Parliament of Canada is only empowered to legislate as far as the circumstances of the case require "for the due execution of the provisions" of the 22nd section. If it were to legislate in such a case as has been supposed, its legislation would necessarily be declared ultra vires by the Courts which had decided that the provisions of the section had not been violated by the Legislature of the province. If, on the other hand, the Governor-General declared a provincial law to be intra vires, it would be an ineffectual declaration. It could only be made effectual by the action of the Courts, which would have for themselves to determine the question which he decided, and if they arrived at a different conclusion and pronounced the enactment ultra vires it would be none the less null and void because the Governor-General in Council had declared it intra vires. These considerations are of themselves most cogent to shew that the 2nd sub-section ought not to be construed as giving to parties aggrieved an appeal to the Governor-General in Council concurrently with the right to resort to the Courts in case the provisions of the 1st sub-section are contravened, unless no other construction of

(1) [1892] A. C. 445.

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the sub-sections be reasonably possible. The nature of the remedy, too, which the 3rd sub-section provides, for enforcing the decision of the Governor-General, strongly confirms this view. That remedy is either a provincial law or a law passed by the Parliament of Canada. What would be the utility of passing a law for the purpose merely of annulling an enactment which the ordinary tribunals would without legislation declare to be null, and to which they would refuse to give effect? Such legislation would indeed be futile.

So far the matter has been dealt with apart from an examination of the terms of the 2nd sub-section itself. The considerations adverted to would seem to justify any possible construction of that sub-section which would avoid the consequences pointed out. But when its language is examined, so far from presenting any difficulties, it greatly strengthens the conclusion suggested by the other parts of the section. The first sub-section is confined to a right or privilege of a "class of persons" with respect to denominational education "at the Union," the 2nd sub-section applies to laws affecting a right or privilege "of the Protestant or Roman Catholic minority" in relation to education. If the object of the 2nd sub-section had been that contended for by the Respondent, the natural and obvious mode of expressing such intention would have been to authorize an appeal from any Act of the Provincial Legislature affecting "any such right or privilege as aforesaid." The limiting words "at the Union" are however omitted, for the expression "any class of persons" there is substituted "the Protestant or Roman Catholic minority of the Queen's subjects," and instead of the words "with respect to denominational schools," the wider term "in relation to education" is used.

The 1st sub-section invalidates a law affecting prejudicially the right or privilege of "any class" of persons, the 2nd sub-section gives an appeal only where the right or privilege affected is that of the "Protestant or Roman Catholic minority." Any class of the majority is clearly within the purview of the 1st sub-section, but it seems equally clear that no class of the Protestant or Catholic majority would have a locus standi to appeal under the 2nd sub-section, because its rights or privileges had been

affected. Moreover to bring a case within that sub-section it would be essential to shew that a right or privilege had been "affected." Could this be said to be the case because a void law had been passed which purported to do something but was wholly ineffectual? To prohibit a particular enactment and render it ultra vires surely prevents its affecting any rights.

It would do violence to sound canons of construction if the same meaning were to be attributed to the very different language employed in the two sub-sections.

In their Lordships' opinion the 2nd sub-section is a substantive enactment, and is not designed merely as a means of enforcing the provision which precedes it. The question then arises, does the sub-section extend to rights and privileges acquired by legislation subsequent to the Union? It extends in terms to "any" right or privilege of the minority affected by an Act passed by the Legislature, and would therefore seem to embrace all rights and privileges existing at the time when such Act was passed. Their Lordships see no justification for putting a limitation on language thus unlimited. There is nothing in the surrounding circumstances, or in the apparent intention of the Legislature, to warrant any such limitation. Quite the contrary. It was urged that it would be strange if an appeal lay to the Governor-General in Council against an Act passed by the Provincial Legislature because it abrogated rights conferred by previous legislation, whilst if there had been no previous legislation, the Acts complained of would not only have been intra vires, but could not have afforded ground for any appeal. There is no doubt force in this argument, but it admits, their Lordships think, of an answer.

Those who were stipulating for the provisions of sect. 22 as a condition of the Union, and those who gave their legislative assent to the Act by which it was brought about, had in view the perils then apprehended. The immediate adoption by the Legislature of an educational system obnoxious either to Catholics or Protestants would not be contemplated as possible. As has been already stated, the Roman Catholics and Protestants in the province were about equal in number. It was impossible at that time for either party to obtain legislative sanction to a

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scheme of education obnoxious to the other. The establishment of a system of public education in which both parties would concur was probably then in immediate prospect. The Legislature of Manitoba first met on the 15th of March, 1871. On the 3rd of May following the Education Act of 1871 received the Royal Assent. But the future was uncertain. Either Roman Catholics or Protestants might become the preponderating power in the Legislature, and it might under such conditions be impossible for the minority to prevent the creation at the public cost of schools which, though acceptable to the majority, could only be taken advantage of by the minority on the terms of sacrificing their cherished convictions. The change to a Roman Catholic system of public schools would have been regarded with as much distaste by the Protestants of the province as the change to an unsectarian system was by the Catholics.

Whether this explanation be the correct one or not, their Lordships do not think that the difficulty suggested is a sufficient warrant for departing from the plain meaning of the words of the enactment, or for refusing to adopt the construction which apart from this objection would seem to be the right one.

Their Lordships being of opinion that the enactment which governs the present case is the 22nd section of the Manitoba Act, it is unnecessary to refer at any length to the arguments derived from the provisions of sect. 93 of the British North America Act. But in so far as they throw light on the matter they do not in their Lordships' opinion weaken, but rather strengthen the views derived from a study of the later enactment. It is admitted that the 3rd and 4th sub-sections of sect. 93 (the latter of which is, as has been observed, identical with sub-sect. 3 of sect. 22 of the Manitoba Act) were not intended to have effect merely when a provincial Legislature had exceeded the limit imposed on its powers by sub-sect. 1, for sub-sect. 3 gives an appeal to the Governor-General, not only where a system of separate or dissentient schools existed in a province at the time of the Union, but also where in any province such a system was "thereafter established by the Legislature of the province." It is manifest that this relates to a state of things created by post-Union legislation. It was said it refers only to acts or decisions of a "pro-

vincial authority," and not to acts of a provincial Legislature. It is unnecessary to determine this point, but their Lordships must express their dissent from the argument that the insertion of the words "of the Legislature of the province" in the Manitoba Act shews that in the British North America Act it could not have been intended to comprehend the Legislatures under the words "any provincial authority." Whether they be so comprehended or not has no bearing on the point immediately under discussion.

It was argued that the omission from the 2nd sub-section of sect. 22 of the Manitoba Act of any reference to a system of separate or dissentient schools "thereafter established by the Legislature of the province" was unfavourable to the contention of the Appellants. This argument met with some favour in the Court below. If the words with which the 3rd sub-section of sect. 93 commences had been found in sub-sect. 2 of sect. 22 of the Manitoba Act, the omission of the following words would no doubt have been important. But the reason for the difference between the sub-sections is manifest. At the time the Dominion Act was passed a system of denominational schools adapted to the demands of the minority existed in some provinces, in others it might thereafter be established by legislation, whilst in Manitoba in 1870 no such system was in operation, and it could only come into existence by being "thereafter established." The words which preface the right of appeal in the Act creating the Dominion would therefore have been quite inappropriate in the Act by which Manitoba became a province of the Dominion. But the terms of the critical sub-section of that Act are, as has been shewn, quite general, and not made subject to any condition or limitation.

Before leaving this part of the case, it may be well to notice the argument urged by the Respondent that the construction which their Lordships have put upon the 2nd and 3rd sub-sections of sect. 22 of the Manitoba Act is inconsistent with the power conferred upon the Legislature of the province to "exclusively make laws in relation to education." The argument is fallacious. The power conferred is not absolute, but limited. It is exerciseable only "subject and according to the following

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provisions." The sub-sections which follow, therefore, whatever be their true construction, define the conditions under which alone the Provincial Legislature may legislate in relation to education, and indicate the limitations imposed on, and the exceptions from, their power of exclusive legislation. Their right to legislate is not indeed, properly speaking, exclusive, for in the case specified in sub-sect. 3 the Parliament of Canada is authorized to legislate on the same subject. There is therefore no such inconsistency as was suggested.

The learned Chief Justice of the Supreme Court was much pressed by the consideration that there is an inherent right in a Legislature to repeal its own legislative acts and that "every presumption must be made in favour of the constitutional right of a legislative body to repeal the laws which it has itself enacted." He returns to this point more than once in the course of his judgment, and lays down as a maxim of constitutional construction that an inherent right to do so cannot be deemed to be withheld from a legislative body having its origin in a written constitution, unless the constitution in express words takes away the right, and he states it as his opinion that in construing the Manitoba Act the Court ought to proceed on this principle, and to hold the Legislature of that province to have absolute powers over its own legislation, untrammelled by any appeal to federal authority, unless it could find some restriction of its rights in that respect in express terms in the Constitutional Act.

Their Lordships are unable to concur in the view that there is any presumption which ought to influence the mind one way or the other. It must be remembered that the Provincial Legislature is not in all respects supreme within the province. Its legislative power is strictly limited. It can deal only with matters declared to be within its cognizance by the British North America Act as varied by the Manitoba Act. In all other cases legislative authority rests with the Dominion Parliament. In relation to the subjects specified in sect. 92 of the British North America Act, and not falling within those set forth in sect. 91, the exclusive power of the Provincial Legislature may be said to be absolute. But this is not so as regards education, which is

separately dealt with and has its own code both in the British North America Act and in the Manitoba Act. It may be said to be anomalous that such a restriction as that in question should be imposed on the free action of a Legislature, but is it more anomalous than to grant to a minority who are aggrieved by legislation an appeal from the Legislature to the Executive Authority? And yet this right is expressly and beyond all controversy conferred. If, upon the natural construction of the language used, it should appear that an appeal was permitted under circumstances involving a fetter upon the power of a Provincial Legislature to repeal its own enactments, their Lordships see no justification for a leaning against that construction, nor do they think it makes any difference whether the fetter is imposed by express words or by necessary implication.

In truth, however, to determine that an appeal lies to the Governor-General in Council in such a case as the present does not involve the proposition that the Provincial Legislature was unable to repeal the laws which it had passed. The validity of the repealing Act is not now in question, nor that it was effectual. If the decision be favourable to the appellants the consequence, as will be pointed out presently, will by no means necessarily be the repeal of the Acts of 1890 or the re-enactment of the prior legislation.

Bearing in mind the circumstances which existed in 1870, it does not appear to their Lordships an extravagant notion that in creating a Legislature for the province with limited powers it should have been thought expedient, in case either Catholics or Protestants became preponderant, and rights which had come into existence under different circumstances were interfered with, to give the Dominion Parliament power to legislate upon matters of education so far as was necessary to protect the Protestant or Catholic minority as the case might be.

Taking it then to be established that the 2nd sub-section of sect. 22 of the Manitoba Act extends to rights and privileges of the Roman Catholic minority acquired by legislation in the province after the Union, the next question is whether any such right or privilege has been affected by the Acts of 1890? In order to answer this question it will be necessary to examine

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somewhat more closely than has hitherto been done the system established by the earlier legislation as well as the change effected by those Acts.

The Manitoba School Act of 1871 provided for a Board of Education of not less than ten nor more than fourteen members, of whom one half were to be Protestants and the other half Catholics. The two sections of the board might meet at any time separately. Each section was to choose a chairman, and to have under its control and management the discipline of the schools of the section. One of the Protestant members was to be appointed Superintendent of the Protestant schools, and one of the Catholic members Superintendent of the Catholic schools, and these two were to be the joint secretaries of the board, which was to select the books to be used in the schools, except those having reference to religion or morals, which were to be prescribed by the sections respectively. The legislative grant for common school education was to be appropriated, one moiety to support the Protestant, the other moiety the Catholic schools. Certain districts in which the population was mainly Catholic were to be considered Catholic school districts, and certain other districts where the population was mainly Protestant were to be considered Protestant school districts. Every year a meeting of the male inhabitants of each district, summoned by the Superintendent of the section to which the district belonged, was to appoint trustees, and to decide whether their contributions to the support of the school were to be raised by subscription, by a collection of a rate per scholar, or by assessment on the property of the district. They might also decide to erect a school house, and that the cost of it should be raised by assessment. In case the father or guardian of a school child was a Protestant in a Catholic district or vice versa, he might send the child to the school of the nearest district of the other section, and in case he contributed to the school the child attended a sum equal to what he would have been bound to pay if he had belonged to that district, he was exempt from payment to the school of the district in which he lived.

Acts amending the education law in some respects were passed in subsequent years, but it is not necessary to refer to them, as

in 1881 the Act of 1871 and these amending Acts were repealed. The Manitoba School Act, 1881, followed the same general lines as that of 1871. The number of the Board of Education was fixed at not more than twenty-one, of whom twelve were to be Protestants and nine Catholics. If a less number were appointed the same relative proportion was to be observed. The board as before was to resolve itself into two sections, Protestant and Catholic, each of which was to have the control of the schools of its section, and all the books to be used in the schools under its control were now to be selected by each section. There were to be as before a Protestant and a Catholic Superintendent. It was provided that the establishment of a school district of one denomination should not prevent the establishment of a school district of the other denomination in the same place, and that a Protestant and Catholic district might include the same territory in whole or in part. The sum appropriated by the legislature for common school purposes was to be divided between the Protestant and Roman Catholic sections of the board in proportion to the number of children between the ages of five and fifteen residing in the various Protestant and Roman Catholic school districts in the province where schools were in operation. With regard to local assessments for school purposes it was provided that the ratepayers of a school district should pay their respective assessments to the schools of their respective denominations, and in no case was a Protestant ratepayer to be obliged to pay for a Catholic school, or a Catholic ratepayer for a Protestant school.

The scheme embodied in this Act was modified in some of its details by later Acts of the Legislature, but they did not affect in substance the main features to which attention has been called. While traces of the increase of the Protestant relatively to the Catholic population may be seen in the course which legislation took, the position of the Catholic and Protestant portions of the community in relation to education was not substantially altered, though the State aid which at the outset was divided equally between them had of course to be adjusted and made proportionate to the school population which each supplied.

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Their Lordships pass now to the Department of Education and Public Schools Acts of 1890, which certainly wrought a great change. Under the former of these Roman Catholics were not entitled as such to any representation on the Board of Education or on the Advisory Board, which was to authorize text books for the use of pupils and to prescribe the forms of religious exercises to be used in schools. All Protestant and Catholic school districts were to be subject to the provisions of the Public Schools Act. The public schools were all to be free, and to be entirely non-sectarian. No religious exercises were to be allowed unless conducted according to the regulations of the Advisory Board, and with the authority of the school trustees for the district. It was made the duty of the trustees to take possession of all public school property which had been acquired or given for public school purposes in the district. The municipal council of every city, town, and village, was directed to levy and collect upon the taxable property within the municipality such sums as might be required by the public school trustees for school purposes. No municipal council was to have the right to exempt any property whatever from school taxation. And it was expressly enacted that any school not conducted according to all the provisions of the Act, or the regulations of the Department of Education, or the Advisory Board, should not be deemed a public school within the meaning of the law, and that such school should not participate in the legislative grant.

With the policy of these Acts their Lordships are not concerned, nor with the reasons which led to their enactment. It may be that as the population of the province became in proportion more largely Protestant, it was found increasingly difficult, especially in sparsely populated districts, to work the system inaugurated in 1871, even with the modifications introduced in later years. But whether this be so or not is immaterial. The sole question to be determined is whether a right or privilege which the Roman Catholic minority previously enjoyed has been affected by the legislation of 1890. Their Lordships are unable to see how this question can receive any but an affirmative answer. Contrast the position of the Roman Catholics prior and subsequent to the Acts from which they appeal. Before these

passed into law there existed denominational schools, of which the control and management were in the hands of Roman Catholics, who could select the books to be used and determine the character of the religious teaching. These schools received their proportionate share of the money contributed for school purposes out of the general taxation of the province, and the money raised for these purposes by local assessment was, so far as it fell upon Catholics, applied only towards the support of Catholic schools. What is the position of the Roman Catholic minority under the Acts of 1890? Schools of their own denomination, conducted according to their views, will receive no aid from the State. They must depend entirely for their support upon the contributions of the Roman Catholic community, while the taxes out of which State aid is granted to the schools provided for by the statute fall alike on Catholics and Protestants. Moreover, while the Catholic inhabitants remain liable to local assessment for school purposes, the proceeds of that assessment are no longer destined to any extent for the support of Catholic schools, but afford the means of maintaining schools which they regard as no more suitable for the education of Catholic children than if they were distinctively Protestant in their character.

In view of this comparison it does not seem possible to say that the rights and privileges of the Roman Catholic minority in relation to education which existed prior to 1890 have not been affected.

Taschereau J. says that the legislation of 1890 having been irrevocably held to be intra vires cannot have "illegally" affected any of the rights or privileges of the Catholic minority. But the word "illegally" has no place in the sub-section in question. The appeal is given if the rights are in fact affected.

It is true that the religious exercises prescribed for public schools are not to be distinctively Protestant, for they are to be "non-sectarian," and any parent may withdraw his child from them. There may be many too who share the view expressed in one of the affidavits in *Barrett's Case* (1), that there should not be any conscientious objections on the part of Roman Catholics

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to attend such schools, if adequate means be provided elsewhere of giving such moral and religious training as may be desired. But all this is not to the purpose. As a matter of fact the objection of Roman Catholics to schools such as alone receive State aid under the Act of 1890 is conscientious and deeply rooted. If this had not been so, if there had been a system of public education acceptable to Catholics and Protestants alike, the elaborate enactments which have been the subject of so much controversy and consideration would have been unnecessary. It is notorious that there were acute differences of opinion between Catholics and Protestants on the education question prior to 1870. This is recognised and emphasised in almost every line of those enactments. There is no doubt either what the points of difference were, and it is in the light of these that the 22nd section of the Manitoba Act of 1870, which was in truth a Parliamentary compact, must be read.

For the reasons which have been given their Lordships are of opinion that the 2nd sub-section of sect. 22 of the Manitoba Act is the governing enactment, and that the appeal to the Governor-General in Council was admissible by virtue of that enactment, on the grounds set forth in the memorials and petitions, inasmuch as the Acts of 1890 affected rights or privileges of the Roman Catholic minority in relation to education within the meaning of that sub-section. The further question is submitted whether the Governor-General in Council has power to make the declarations or remedial orders asked for in the memorials or petitions, or has any other jurisdiction in the premises. Their Lordships have decided that the Governor-General in Council has jurisdiction, and that the appeal is well founded; but the particular course to be pursued must be determined by the authorities to whom it has been committed by the statute. It is not for this tribunal to intimate the precise steps to be taken. Their general character is sufficiently defined by the 3rd sub-section of sect. 22 of the Manitoba Act. It is certainly not essential that the statutes repealed by the Act of 1890 should be re-enacted, or that the precise provisions of these statutes should again be made law. The system of education embodied in the Acts of 1890 no doubt commends itself to, and adequately supplies the

wants of the great majority of the inhabitants of the province. All legitimate ground of complaint would be removed if that system were supplemented by provisions which would remove the grievance upon which the appeal is founded, and were modified so far as might be necessary to give effect to these provisions.

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Their Lordships will humbly advise Her Majesty that the questions submitted should be answered in the manner indicated by the views which they have expressed.

There will be no costs of this appeal.

Solicitors for appellants: *Bompas, Bischoff, Dodgson, Coxe & Bompas.*

Solicitors for respondent: *Freshfields & Williams.*

[PRIVY COUNCIL.]

SHENTON . . . . . DEFENDANT;

AND

SMITH . . . . . PLAINTIFF.

J. C.* 1894 *Dec.* 7, 11. 1895 *Feb.* 2.

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

Prerogative of the Crown — Petition of Right — Colonial Servants of the Crown hold Office during Pleasure.

A Colonial Government is on the same footing as the Home Government as to the employment and dismissal of servants of the Crown; and in the absence of special contract they hold their offices during the pleasure of the Crown.

Where the respondent, having been gazetted, without any special contract, to act temporarily as medical officer during the absence on leave of the actual holder of that office, was dismissed by the Government before the leave had expired:—

Held, that he had no cause of action.

APPEAL from an order of the Supreme Court (Jan. 16, 1893), affirming a judgment and verdict for the respondent (Oct. 20, 1892).

The facts are stated in the judgment of their Lordships.

* *Present*:—THE LORD CHANCELLOR, LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, and LORD SHAND.

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Finlay, Q.C., and *G. Lawrence*, for the appellant, contended that the respondent held the temporary office of resident medical officer at Albany at the pleasure of the Crown. So holding, he could be dismissed without notice and without cause, and an action for wrongful dismissal would not lie in the absence of some special contract between the respondent and the Government in modification of the ordinary tenure on which he would otherwise hold his office. To prove such special contract reliance had been placed upon certain rules and regulations of the Colonial Service called "The Colonial Office List," said to have been printed "for the information and guidance of Colonial Governors and their subordinate officers." It was contended that there was no foundation for saying that those rules and regulations operated as a contract between Her Majesty and her officers.

Channell, Q.C., and *Bray*, for the respondent, contended that he was not appointed "during pleasure," but for a definite period, namely, during the absence of Dr. Rogers, the holder of the permanent appointment, and that he could not be dismissed during that period without due cause. The Civil Service Regulations contained provisions as to the procedure to be adopted by the Governor in case he desires to suspend or dismiss an officer from his office. The published regulations must be deemed to have formed part of the contract between the Crown and the respondent, and he could only be lawfully dismissed in accordance with the procedure prescribed thereby. This case ought to be treated on the same footing as if it were a question between subject and subject, being between a local government and a subject. The Colonial Government is not the Crown, and dealt with the respondent on the same footing as a private corporation. It does not possess the immunities of the Crown, nor has it the same discretionary power of dismissing public servants. [LORD WATSON:—Then why did you proceed by petition of right?] Reference was made to *Farwell* v. *Bowman* (1); *Attorney-General of the Straits Settlement* v. *Wemyss* (2). [THE LORD CHANCELLOR:—Why do you cite these cases? They relate to actions of tort, and this is not an action

(1) 12 App. Cas. 643, 649. (2) 13 App. Cas. 192.

of tort.] See *Willis* v. *Gipps* (1). [THE LORD CHANCELLOR :— We are dealing with the case of a Governor of a Crown Colony, not a Colony with representative institutions.] See *Robertson* v. *Dumaresq* (2); *Maw* v. *Jones* (3).

Lawrence replied, citing *Buron* v. *Denman* (4), per Parke, B., at p. 189.

1895
Feb. 2.

The judgment of their Lordships was delivered by

LORD HOBHOUSE :—

The substantial question in this appeal is the question on what terms was the respondent, Dr. Smith, engaged in the service of the Government of Western Australia. He claims damages on the ground that he was wrongfully dismissed contrary to the rules and regulations of Her Majesty's service and to the terms of his employment therein. The appellant, who represents the Government, contends that the respondent's employment was only temporary and during the pleasure of the Government; and that, though in point of fact he was dismissed after hearing and for good cause, the right of the Government was to dismiss him at will.

It appears that in the month of April, 1887, Dr. Rogers, who was medical officer at Albany, obtained leave of absence, and the respondent was desirous of acting in his place. He was accepted, and in the Government *Gazette* of the 8th of June, 1887, it was notified that His Excellency the Governor had been pleased to approve of the following temporary appointment, namely: "Henry Lionel Smith, Esqre., to act as medical officer at Albany during the temporary absence of Cecil Rogers, Esqre., granted leave of absence."

About eight months afterwards the respondent asked to have his appointment made permanent, but was informed that the Government had decided not to interfere with the existing arrangement. So matters went on until the following July, when events happened at the Albany Hospital which resulted in

(1) 5 Moo. P. C. 379, 391.
(2) 2 Moo. P. C. (N.S.) 66, 72, 73.
(3) 25 Q. B. D. 107.
(4) 2 Ex. 167.

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the death of a boy, and for which blame was attached to the respondent at the coroner's inquest.

On the 9th of July, 1888, an order was passed by the Governor directing that the respondent should be informed that his tenure of office would cease at the close of the year, and the respondent was informed accordingly. He sent to the Governor a statement of his case, and a request that the order should be reconsidered. His request was not granted, but the term of his acting appointment was extended to allow time for appeal to the Secretary of State.

All the papers, including the correspondence and the proceedings at the inquest on the boy, with a further argument on the part of the respondent, were transmitted to the Secretary of State, who replied that he saw no reason to interfere with the Governor's decision. This result was at once communicated to the respondent, in a letter dated the 8th of March, 1889, in which he was informed that his tenure of the acting appointment would cease on the 15th of that month.

In October, 1889, Dr. Smith presented a petition of right, making the Colonial Secretary defendant, and, after the usual formalities, the petition was permitted to proceed. No questions of procedure arose upon it other than such as are common to an ordinary plaintiff and defendant. The trial of the cause took place before Stone J., when that learned judge expressed an opinion that the plaintiff ought to be non-suited, but, on the plaintiff objecting, he did not make an order of non-suit. So the trial proceeded; but it became abortive because the jury could not agree.

A new trial then took place before Onslow C.J., who put several specific questions to the jury. The first was whether the plaintiff was led to believe that he would hold the office during good behaviour so long as the office existed: to which the jury answered Yes. They then went on to find that the Government had not given reasonable notice to the plaintiff, and had no reasonable cause to dismiss him, and they assessed his damages at £200.

The defendant moved for a new trial or to have judgment entered up in his favour. That motion was refused, subject to the

reservation of a question for the Full Court, which the Chief Justice states thus: Whether the plaintiff, though appointed temporarily, was still entitled to be treated in accordance with the procedure laid down in the Colonial Office Regulations with regard to the dismissal of public servants. It is agreed that the procedure in question was not followed.

On the argument of this question before the Full Court the Chief Justice took a view adverse to the defendant. Stone J., who was the other judge, took the opposite view. The necessary result was that the verdict which the plaintiff had got remained undisturbed. Hence the present appeal.

The reasoning of the learned Chief Justice is not quite easy to follow. He says that the jury found as a fact that the plaintiff was led to believe that he would hold the office during good behaviour as long as the office existed. But it does not appear what weight he attached to that finding, because he allows that it was not strictly supported by the evidence, and his own finding is only that the plaintiff was to act during the absence of Dr. Rogers—a compact which he thinks was broken by the Government in dismissing him. There is not indeed a tittle of evidence to support the finding of the jury; and their Lordships agree with the defendant's contention that the question ought not to have been put, or, if put, should have been answered in the negative. The only evidence on the point is that of the plaintiff, who merely says that he got the *Gazette* notice; that Mr. Loftie, the Government Resident at Albany, gave him a Colonial Office List which contains a copy of the regulations; and that he considered that he held his office subject to his good behaviour. He does not even state, to say nothing of proving, that any one led him to believe that he was to hold during good behaviour, or that the regulations would form part of his contract with the Government. There is, therefore, no special contract in the case. The contention on this point must be that in every case a Government servant, to whom the regulations are communicated, is entitled to keep his office until suspended or dismissed according to the procedure thereby prescribed to the Government. That is a legal inference depending on the nature of the regulations, and not for the jury to decide.

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The learned Chief Justice indeed goes on to say that it is not necessary to decide whether the procedure of the regulations should have been followed, because the jury have found that there was no good cause of dismissal. But that finding is irrelevant unless the Government was bound to shew good cause of dismissal; and that question must, except on one supposition, depend upon the former question which the Chief Justice declines to decide.

The supposition in question is that the Government had entered into an absolute unconditional engagement with the plaintiff to employ him during the absence of Dr. Rogers; and it may be that such was the view of the learned Chief Justice. But there is nothing in the case to support such a view. The plaintiff applied for the post, was gazetted as to a temporary acting appointment, applied to be appointed permanently, and was refused. That is positively all. How is it possible on that to contend that he has a firmer hold on his acting appointment than Dr. Rogers had on his permanent appointment? The defendant contends that the plaintiff had not so firm a hold; but that, even if it were decided that an official in the position of Dr. Rogers is entitled to hold during good behaviour, such a right would not extend to one who is appointed for a mere temporary purpose. That view appears to their Lordships to be quite sound; but they do not further dwell upon it, because they prefer to rest their judgment on a broader ground.

It has been argued at the bar that a Colonial Government stands on a different footing from the Crown in England, with respect to obligations towards persons with whom it has dealings. Their Lordships do not go into the cases cited for proof of that proposition, for they are quite different from this case, and neither principle nor authority has been adduced to shew that in the employment and dismissal of public servants a Colonial Government stands on any different footing than the Home Government.

It appears to their Lordships that the proper grounds of decision in this case have been expressed by Stone J. in the Full Court. They consider that, unless in special cases where it is otherwise provided, servants of the Crown hold their offices

during the pleasure of the Crown; not by virtue of any special prerogative of the Crown, but because such are the terms of their engagement, as is well understood throughout the public service. If any public servant considers that he has been dismissed unjustly, his remedy is not by a law-suit, but by an appeal of an official or political kind. Dr. Smith did, in fact, make such an official appeal to the Secretary of State, and the Colonial Government recognised his right to do so, and prolonged his tenure so as to allow time for the decision of that appeal, and to save him from injury if it should go in his favour. Where there is representative government the other estates may, if they think fit, make themselves the mouth-piece of that sort of grievance against the Crown as of any other. In a Crown Colony, as Western Australia then was, this appeal to the Secretary of State exhausted the plaintiff's remedies within the Colony.

As for the regulations, their Lordships again agree with Stone J. that they are merely directions given by the Crown to the Governments of Crown Colonies for general guidance, and that they do not constitute a contract between the Crown and its servants. In the heading they are stated to be "printed for the information and guidance of the Governors of Her Majesty's Colonies and of all Her Majesty's officers subordinate to them." They are alterable from time to time without any assent on the part of Government servants, which could not be done if they were part of a contract with those servants. On the face of them it is pointed out (see regulation 64) to be the general rule in Crown Colonies that offices are holden during Her Majesty's pleasure. The difficulty of dismissing servants whose continuance in office is detrimental to the State would, if it were necessary to prove some offence to the satisfaction of a jury, be such as seriously to impede the working of the public service. No authority, legal or constitutional, has been produced to countenance the doctrine that persons taking service with a Colonial Government to whom the regulations have been addressed, can insist upon holding office till removed according to the process thereby laid down. Any Government which departs from the regulations is amenable, not to the servant dismissed,

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but to its own official superiors, to whom it may be able to justify its action in any particular case.

The result is that in their Lordships' judgment the Court below should have ordered judgment to be entered for the defendant. As regards the costs of the litigation below, the appellant's counsel has not pressed for them, but has preferred to leave the matter to this Board. The respondent has made a wrongful claim, and has not acquiesced in the simplest method of bringing his claim to a test by means of a non-suit. On the other hand, the appellant has raised defences which have been decided against him. Under all the circumstances of the case, their Lordships think that justice will be done by entering the judgment for the defendant without costs. They will humbly advise Her Majesty accordingly.

The costs of this appeal stand in a different position. The verdict was for £200, which is under the amount for which an appeal lies in strict course of law. Special leave to appeal was granted because of the general nature of the question; but this Board thought that it would be hard for the individual suitor to bear the costs of an appeal admitted on such a ground, and they therefore put the appellant under the obligation to pay costs in any event. The order will be according to that condition.

Solicitors for appellant: *Sutton, Ommaney, & Rendall.*
Solicitor for respondent: *John W. Sykes.*

[PRIVY COUNCIL.]

HAMELIN AND ANOTHER . . . . . DEFENDANTS; J. C.*

AND 1894

BANNERMAN AND OTHERS . . . . . PLAINTIFFS. *July* 26, 27.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA, PROVINCE OF QUEBEC. 1895 *Feb.* 2.

Riparian Proprietor — Navigable River — Sale of Water-Power artificially created.

A riparian proprietor, notwithstanding that the river is navigable, can acquire an interest in its water-power, as derived from a reservoir artificially formed by a dam across its channel, and sell the same along with and as appurtenant to his land. Even if such sale should not be effectual against the public, the vendor cannot himself impeach it on that ground.

Held, in this case, that as the vendor of a specified amount of water-power had not reserved to himself a right to a supply either pari passu with or preferably to the purchaser, the latter was entitled to damages in respect of any loss incurred by the vendor's user of the water in diminution of the amount sold.

APPEAL from a decree of the Court of Queen's Bench (June 23, 1893) reversing a judgment of the Superior Court (Oct. 20, 1891).

The facts are stated in the judgment of their Lordships.

Sir *R. Webster*, Q.C., *Mackay* (of the Canadian bar), and *Vernon Smith*, for the appellants.

Fullarton, Q.C., and *Beauchamp*, Q.C. (of the Canadian bar), for the respondents.

The judgment of their Lordships was delivered by 1895 *Feb.* 2.

LORD WATSON :—

The appellants Hamelin and Ayer were, in 1881, proprietors of land lying on both sides of the North River, within the town

* *Present*:—LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, and SIR RICHARD COUCH.

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of Lachute. They were also owners of the whole water-power derivable from a pool or reservoir formed by the erection of a dam across the channel of the river.

By deed dated the 15th of July, 1881, the appellants sold and conveyed to the late Robert Bannerman, for the sum of $1000, a piece of ground on the south bank of the river, "together with a quantity of water-power equivalent to fifty horse-power, to be taken off from the water-power and dam of said vendors on the North River, and now in use to run their manufacture, said water-power to be taken at a place convenient to run the wheels and machinery to be placed by said purchaser in his rope manufacture on the hereby bargained and sold piece or parcel of land." The sale and conveyance were made with "promise of warranty against all troubles and hindrances generally whatsoever"; and it was agreed that the purchaser should have the option, at any time within five years, of acquiring any additional quantity of water-power, not exceeding fifty horse-power, which might be required in connection with the water-power already sold, at the price of $25 for each additional horse-power.

The following condition, which is of some importance in this case, was inserted in this deed of sale: "It is hereby further agreed by and between the said parties that should any accident or leakage happen to the dam of said vendors across said North River, or that said dam should require to be repaired from any cause or reason, the said purchaser or legal representatives shall have no right whatever of claiming any damages from said vendors for any loss of time or losses caused by such accident to said dam, or that it require repairing provided that the said dam be repaired or fixed in the course of the time reasonable and required for such repairs during which time the said vendors shall have the privilege of withdrawing the supply of water from said purchaser, if absolutely necessary."

In pursuance of the option reserved to him by the deed of 1881, the late Robert Bannerman, on the 2nd of April, 1886, obtained from the appellants a deed conveying to him an additional quantity of water from the dam, equivalent to fifty horse-power, to be held and used by him and his successors, in

connection with and upon the same terms and conditions as the supply he had already purchased.

Robert Bannerman, immediately after his acquisition of the land, established a rope work upon it, which continued in operation at least until the date of this action. Upon his death in July, 1887, his interest in the land and water-power connected with it passed to the respondents in this appeal. Before the date of the first sale to Bannerman, the appellants had erected and they have since maintained and worked, a woollen factory on the north side of the river, the machinery being driven by water-power from the dam. In the year 1883 a bobbin factory on the north bank of the river, a little way above their own works, was let by the appellants to one Hambleton, who continued to be their tenant until 1890, and during his occupation derived his motive power from the same source. The water supply does not appear to have ever been used for any manufactory other than these three.

The present suit was brought by the respondents, in September, 1888, before the Superior Court. In their writ and declaration they alleged that for years past the supply of water had generally been sufficient, at all seasons of the year, to furnish the amount of water-power to which they were entitled under their conveyances from the appellants; but that, during several seasons of drought, whilst the whole supply obtainable was about, or even less than, 100 horse-power, more than half of it had been wrongfully appropriated and used by the appellants and their tenant; and they claimed (1.) a declaration that they were entitled to a supply of 100 horse-power in priority to the appellants or their tenant; (2.) an injunction against interference with their preferable right; and (3.) decree for $1000 as damages in respect of their having been deprived of that right.

In answer to these claims, the appellants put forward a great variety of defences, of which it will be sufficient to state the substance. They pleaded, in bar of the action, that, the North River being navigable, its water could not be the subject of commerce; that, according to the spirit and sense of the deeds of sale, the respondent's right to 100 horse-power was not preferential, but without prejudice to the appellants' right to use

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the water for their factory; and that, according to law, the first use of the water belonged to the appellants as the oldest manufacturers. In answer to the respondents' pecuniary claim they pleaded that, if the respondents had suffered damage, it was not due to any act or default of theirs, but was occasioned by the necessity of repairing injuries to the dam from ice or floods, or by defects in the respondents' machinery and arrangements for using the water.

The case went to trial on these pleadings before the Honourable Judge Taschereau, who, after a voluminous proof had been led by both parties, sustained the defence, and dismissed the suit with costs. The learned judge held in effect that, according to the legal construction of the deeds, the respondents had acquired nothing more than a right to take water representing 100 horse-power from the reservoir, if and when it was possible to do so, without affecting the supply of water required for the appellants' factory, which had existed before their rope work. That finding in law was necessarily fatal to the respondents' claim for damages, which was based upon the assumption that they had a preferential right to their stipulated quantity of water-power. The learned judge further held, in point of fact, that the short supply actually received by the respondents was due partly to force majeure, or, in other words, to the low state of the river, aggravated by the disrepair of the dam, from natural causes beyond the control of the appellants, and partly to their defective machinery.

On appeal, the Court of Queen's Bench, consisting of Sir Alexander Lacoste C.J., with Baby, Bossé, Blanchet and Hall JJ., unanimously reversed the decision of the Superior Court; granted a declaration and injunction to the effect craved by the respondents; and also gave them a decree for $1000, being the full amount of the damages which they claimed. The reasons for the judgment of the Appeal Court were fully rendered by Hall J.

Their Lordships have not found the questions of law which were raised and discussed by the appellants, in the course of the argument addressed to them, to be attended with difficulty. The fact that the North River may be in some sense navigable

cannot prevent a riparian owner from acquiring an interest in its water-power, which he can sell along with and as appurtenant to a parcel of his land. Even if the appellants had been unable, as they say they were, to give the respondents a good title as against the public, the law would not have permitted them first to sell a prior right to the water-power, and pocket the price, and then to pose as members of the public, and to deprive their purchaser of the water by using it themselves.

Again, their Lordships see no reason to doubt that, in a question with the appellants, or any one who has derived an interest from them since April, 1886, the respondents have a preferable right to take water from the reservoir in question to the extent of 100 horse-power. The deeds of sale are in terms absolute; they do not contain any reservation to the sellers to take a supply of water-power, either in priority to, or pari passu with, the purchaser; and they are granted with full warranty against eviction. The warranty imports that the purchaser and his successors in title shall not be hindered by any one in the exercise of their right to take preferably, from the water of the reservoir, a supply for their factory equivalent to 100 horse-power. There is no warranty that the river will bring to the reservoir a sufficient quantity of water to yield that amount of motive power at all seasons. And there is an express exception from the warranty in the clause which has already been quoted with reference to necessary repair of the dam by the appellants. During legitimate repairs the reservoir may cease to supply water available for manufacturing purposes; or it may supply less than the amount to which the respondents are entitled. The clause protects the appellants against liability in respect of such failure or shortcoming; but it gives them no right, when the actual supply of water is less than 100 horse-power, to appropriate any part of it which may be required for the use of the rope work in prejudice of the respondents.

In these circumstances the case presented by the appellants appears to their Lordships to resolve into two questions, which are questions of fact depending on the evidence: (1.) Were the respondents, through the act or default of the appellants, hindered from obtaining the full amount of water-power

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required for their factory, such amount not being in excess of 100 horse-power? (2.) Was any deficiency in the respondents' water-power due to their own failure to make proper arrangements for its reception, and to provide proper machinery? In the event of the first of these questions being answered in the affirmative, and the second in the negative, a further question arises, as to the amount of damage, if any, which the respondents have suffered through the illegal conduct of the appellants.

The proof led by the parties, in so far as it relates to the dam, to the storage capacity of the reservoir which it forms, the precise means which have been employed, and the best available means which could be employed, for distributing the water-power which it represents among the parties interested, cannot be regarded as satisfactory. Facts capable of precise ascertainment, by measurement and otherwise, are left to speculation, and the estimates of the witnesses differ widely. But, so far as their Lordships are able to judge, the evidence favours the conclusion that the relative levels of the intake sluices, for the appellants' and respondents' works, have remained unchanged since the date when the respondents' factory was started, and that no substantial alteration has been made since that time upon any of the mechanical arrangements for distributing and utilizing the water-power of the reservoir. Their Lordships must not be understood as indicating an opinion that the arrangements then made must remain stereotyped for ever; but they are of opinion that, until some steps were taken by the appellants, with a view to a new adjustment, the respondents were justified in leaving their original arrangements and machinery unaltered.

Their Lordships have been unable to find in the evidence any ground for affirming, either that the pier erected by the respondents in connection with their factory had any effect in diminishing the motive force of the water which they used, or that the machinery through which that force was developed was in any respect defective.

Keeping in view the opinion already expressed by their Lordships, with regard to the nature of the warranty undertaken by the appellants, it does not admit of doubt that, for at least eighteen months before this suit was brought, they acted in per-

sistent violation of the warranty. During that period there were two exceptionally dry seasons; and the effect which the prevailing drought had in diminishing the supply of water was seriously aggravated by the state of disrepair into which the dam had fallen, owing to the action of floods and ice. It is neither alleged nor proved that the appellants failed to take proper measures for the restoration of the dam, or failed to execute the necessary repairs within a reasonable time. But the evidence shews that, whilst the river was low, and the repairs were going on, there was generally, if not constantly, an available supply of water-power obtainable from the reservoir. The evidence does not suggest that the total amount of water-power available at these times ever exceeded 100 horse-power. On the contrary, the evidence on both sides points to the inference that it frequently was considerably short of that amount. And it is proved beyond question that the appellants and their tenant appropriated the bulk of the horse-power available with this result, that, when the appellants and their tenant stopped working, the respondents had ample water-power to drive their machinery, and that, whilst the factories of the appellants and their tenant were in operation, the respondents' supply of water-power was either insufficient or wholly ineffective.

The conclusion appears to their Lordships to be inevitable that the appellants must bear the loss resulting to the respondents from their having, during the period already indicated, systematically deprived the respondents of the amount of water-power to which they were legally entitled. Their Lordships, having examined the evidence bearing upon the pecuniary estimate of that loss, are unable to differ from the result arrived at by the Court of Queen's Bench. They will, accordingly, humbly advise Her Majesty that the judgment appealed from ought to be affirmed. The appellants must bear the costs of this appeal.

Solicitors for appellants: *Bircham & Co.*
Solicitors for respondents: *Simpson & Co.*

[PRIVY COUNCIL.]

J. C.* 1895 Jan. 24; March 6.

NEWTON AND OTHERS . . . . . APPELLANTS;

AND

THE DEBENTURE-HOLDERS AND THE LIQUIDATORS OF THE ANGLO-AUSTRALIAN INVESTMENT, FINANCE, AND LAND COMPANY . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Law of New South Wales—37 Vict. No. 19—Power of Company to create a First Charge on its Uncalled Capital.

Under New South Wales Act, 37 Vict. No. 19 (which for the purposes of this case is identical with the English Companies Act, 1862), a company limited by shares can create a charge upon its uncalled capital so as to confer priority in the winding-up.

In re Pyle Works (44 Ch. D. 534) approved.

Where the memorandum of association authorized the giving any security of any description for money, *held* that this authorized a charge upon the whole uncalled capital in the absence of any article excluding any part thereof from its operation.

APPEAL from an order of the Supreme Court (May 19, 1893), declaring on the liquidator's application that the debentures of the above-named company are a valid charge over all the uncalled capital of the company, and over the real and personal property of the company at the date of the liquidation. The circumstances under which the question as to the validity thereof arose are stated in the judgment of their Lordships.

Chubb, and *Fletcher*, for the appellants, who were depositors in the company, contended that the uncalled capital, at the date of the resolution to wind up, ought to be applied in satisfaction of all its liabilities pari passu. Reference was made to sect. 184, sub-sects. 1, 9, and 10 of the Companies Act of New South Wales (37 Vict. No. 19). Neither the memorandum nor the original

* *Present* :—THE LORD CHANCELLOR, LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, LORD SHAND, LORD DAVEY, and SIR RICHARD COUCH.

articles of association conferred upon the company power to charge its uncalled capital. The company did not possess the power to do so, and any attempt to acquire such power by special resolution or otherwise was ultra vires and inoperative. Even assuming such a power had been validly obtained, it could only apply to such future calls as were made whilst the company was a going concern; it would not operate upon calls which might be made by the liquidator in the winding-up. These latter would be free from the charge, and would be applicable pari passu in discharge of all the debts of the company. Reference was made to *In re Pyle Works* (1); *Stanley's Case* (2); *In re Phœnix Bessemer Steel Company* (3); *In re Whitehouse & Co.* (4); *Black & Co.'s Case* (5).

Sir Richard Webster, Q.C., and *G. Henderson*, for the respondents, contended that the company possessed the disputed power. The Colonial Act was the same in this respect as the English Act, and the cases cited on the other side, especially *In re Pyle Works* (1), shewed that that power was recognised by the Courts in England.

Chubb, replied.

1895 *March* 6.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN:—

The Anglo-Australian Investment Finance and Land Company, Limited, was incorporated in 1880, as a company limited by shares under the Colonial Statute 37 Vict. No. 19, known as the Companies Act, 1874. The company is now in course of voluntary liquidation.

A question has arisen in the winding-up, between holders of debentures claiming to have a first charge on the capital of the company which remained uncalled at the commencement of the liquidation, and a large body of persons who had money on deposit with the company, and who are creditors without security.

(1) 44 Ch. D. 534.
(2) 4 D. J. & S. 407.
(3) 44 L. J. (Ch.) 683.
(4) 9 Ch. D. 595.
(5) L. R. 8 Ch. 254, 263.

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In the Supreme Court of New South Wales this question has been decided in favour of the debenture-holders by the Chief Judge in Equity. The appeal is brought on behalf of the depositors from his decision.

For the purposes of this appeal it may be taken that the provisions of the Colonial Statute are identical with those of the Companies Act, 1862.

In the argument before their Lordships the appellants disputed the priority claimed by the debenture-holders on three grounds: (1.) They maintained that it is not competent for any company limited by shares to create a charge upon its uncalled capital, so as to confer priority in the winding-up; (2.) they contended that in the present case a charge on uncalled capital was impliedly prohibited by the terms of the memorandum of association; and (3.) they argued that if the charge was valid to any extent it did not apply to so much of the uncalled capital as was reserved by the articles of association to be dealt with only in a particular event and under a special resolution.

The power of a company limited by shares to charge uncalled capital has been the subject of several reported cases in this country. The Court seems almost always to have regarded such a charge with disfavour. Whenever the question has arisen borrowing powers have been construed strictly, and sometimes perhaps rather narrowly. But no case was cited to their Lordships in which any judge has ever held it to be beyond the powers of a limited company to create a charge upon its uncalled capital.

Stanley's Case (1) in 1864, goes further in that direction than any other. There Knight Bruce and Turner L.JJ. laid great stress on the difficulty of enforcing a charge on uncalled capital, owing to the discretionary power of making calls which the company's deed of settlement entrusted to the directors, and they seem to intimate that, assuming the borrowing powers of the company to have extended to future calls, it would have been a breach of trust on the part of the directors to give effect to the charge, though created by their own act under the authority of the company—a proposition which it is somewhat difficult to

(1) 4 D. J. & S. 407.

follow. The decision, however, turned entirely upon the construction of the deed of settlement. There was power to charge "the property or funds" of the company. It was held that that expression did not include future calls. "They are property," said Turner L.J., "not of the society immediately, but which may be called up by the directors of the society at their discretion." The context, too, was relied on as shewing that the property intended to be charged was property capable of being "assigned, transferred, conveyed or surrendered." *Stanley's Case* (1) was approved and followed by this Board in the *Bank of South Australia* v. *Abrahams* (2), where the judgment was delivered by James L.J. But there the difficulty in connection with the discretionary power of the directors in regard to calls was treated merely as an argument against implying a power to charge future calls where the language of the instrument was doubtful. And it certainly seems to be assumed in the judgment that by "apt and proper words or a sufficient context" a power to charge uncalled capital may be conferred. In *In re Phœnix Bessemer Steel Company* (3), Jessel M.R., said, "There can be no doubt that the power can be given to a company by the articles of association." He brushed aside the difficulty which weighed so much with the Lords Justices, observing that to his mind it was no difficulty at all, and referring to the case of companies governed by the Companies Clauses Consolidation Act, 1845. Where such companies have power to create mortgages the statute itself confers upon them as incidental to that power a power to charge future calls. The decision in *In re Phœnix Bessemer Steel Company* (3) was in 1875. During the last twenty years Sir G. Jessel's opinion has been followed in many cases, and many securities have been given and taken on the faith of it. Kay J. adopted the same view in the case of *Howard* v. *Patent Ivory Manufacturing Company* (4), which was decided in 1888. More recently still, in 1890, the question came before the Court of Appeal in *In re Pyle Works* (5). After examining all the previous authorities and discussing the matter very fully, Cotton

(1) 4 D. J. & S. 407.
(2) L. R. 6 P. C. 265.
(3) 44 L. J. (Ch.) 683.
(4) 38 Ch. D. 156.
(5) 44 Ch. D. 534.

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and Lindley L.JJ. upheld a charge on uncalled capital. They found nothing in the Act expressed or implied to prevent or avoid such a security. Lopes L.J., with some hesitation, concurred in the judgment. The main argument against the validity of the charge was that it seemed to contravene the directions of the Act in regard to the application of moneys recovered from contributories in the winding-up. But the answer was obvious. The liability of a contributory as a present member to pay calls in the winding-up, is not a liability springing into existence for the first time on the company going into liquidation. It is merely the ripening of that liability which the contributory undertook when he became a member. The liquidator, no doubt, is bound to distribute what belongs to the company in the manner prescribed by the Act. But after all the question is, What does belong to the company? What are its assets or its property? That must depend on what dispositions have been made, and what charges have been validly created while the company acting within its powers was free to deal as it pleased with its own.

Their Lordships see no reason to differ from the conclusion at which the Court of Appeal arrived in the case of *In re Pyle Works* (1). But they desire to add that if they had felt any doubt about the matter they would have been most reluctant to introduce into the administration of company law in a Colony which has adopted the Act of 1862 a rule different to that established by judicial decisions in this country. There is no case in which uniformity or practice is more important or more desirable.

The second point may be dealt with shortly. The debentures expressly charge all uncalled capital. The articles of association as altered by special resolution contemplate and provide for such a charge. A regulation made by special resolution is of the same validity as if it had been originally contained in the articles of association. The special resolution does not indeed purport in terms to authorize a charge upon uncalled capital, because no doubt it was assumed that that power had already been conferred by the memorandum of association. If the power

(1) 44 Ch. D. 534.

is to be found there, nothing is wanting to make the case complete. On the other hand, if the memorandum when authorizing certain charges has omitted to authorize a charge upon uncalled capital, the omission may imply a prohibition.

Now among the objects for which the company was established is this, "to receive money on loan or deposit or otherwise and upon any security of the company or upon the security of any property of the company or without giving security." Their Lordships have no hesitation in coming to the conclusion that those words authorize a charge on uncalled capital. There would be some difficulty, and perhaps not much advantage, in attempting to define precisely the meaning of each of the two expressions "any security of the company" and "the security of any property of the company" in the order and position in which they occur. If they are taken separately there is room for criticism and possibly for argument. But their combined effect is hardly open to question. Evidently the intention was that all the resources of the company, from whatever quarter they might be derived and in whatever state they might happen to be, should be available for the development of the company's business. The power given by this clause of the memorandum is referred to in a subsequent passage in the memorandum itself as "the general power of the company to give any security of any description for money." That is really what it comes to, and in their Lordships' opinion that is the substance and meaning of the clause.

The only other point to be mentioned is an ingenious argument which was founded upon art. 6 of the articles of association. That article is in the following terms:—

"The total amount to be called up in respect of shares shall not exceed £5 per share unless and until the company shall by special resolution . . . . determine that the paid up capital of the company has become insufficient to meet its liabilities and that it is therefore necessary to call up the whole or portion of the balance of £5 per share, but in the event of the company so determining the company may by special resolution also determine what amount of such unpaid capital is required to be called up and within what time or times and may prescribe or authorize

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the directors to prescribe in what sums per share and at what intervals the amount so required is to be called up or paid and what notices (if any) are to be given of calls having been made and on what days or within what periods calls or instalments are to be payable."

It appears that at the time when the debentures were issued the prescribed limit of £5 per share had not been reached. There was therefore a portion of the uncalled capital which remained under the directors' control. On behalf of the appellants it was argued that, assuming the charge to be good to any extent, it must be confined to that part of the uncalled capital which was still at the call of the directors. The balance, it was said, was intended to be reserved for the benefit of the general creditors in the event of liquidation. In their Lordships' opinion it is impossible so to construe the article in question. If the company had power to charge its uncalled capital there is nothing in this article excluding any part of the uncalled capital from the operation of the charge. Nor is the reservation, such as it is, calculated to give rise to any practical difficulty. Unless and until the company makes default the debenture-holders have no right to intervene. In the meantime the provision is rather a protection to the debenture-holders. It is an additional safeguard for their interest. On default being made, the debenture-holders would be in a position to present a petition for the winding up of the company. In the event of winding-up the provisions of art. 6 would no longer be in force, and there would be nothing to prevent the whole of the uncalled capital being applied in or towards the satisfaction of the claims of the debenture-holders.

Their Lordships are, therefore, of opinion that the appeal wholly fails, and they will humbly advise Her Majesty that it ought to be dismissed. The appellants must pay the costs of the appeal.

Solicitors for appellant: *Barraud, Regge, & Jupp.*
Solicitors for respondents: *Cheston & Son.*

[PRIVY COUNCIL.]

BEAVER. . . . . APPELLANT;

AND

THE MASTER IN EQUITY OF THE SUPREME COURT OF VICTORIA. . } RESPONDENT.

J. C.*
1894
Jan. 26;
Nov. 30.
1895
Jan. 29.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Law of Victoria—Administration and Probate Act, 1890—*Local situation of Testators' Assets—Partnership Business in the Colony distinct from the General Business of the Firm.*

Where a firm carried on businesses in London, Melbourne, and Adelaide, which were severally treated as distinct in the partnership agreement, and also in the accounts and mode of conducting the same:—

Held, that the interest of a deceased partner in the business carried on at Melbourne was locally situate in the Colony of Victoria so as to be liable to probate duty in respect of his will.

APPEAL from an order of the Supreme Court (October 1, 1892) upon a special case stated for its opinion under the Administration and Probate Act (54 Vict. No. 1060) by the respondent.

The question in the appeal was whether the partnership interest of Philip Falk, deceased, in the business of P. Falk & Co., at Melbourne, in Victoria, at the time of his death, is chargeable with duty in Victoria under the said Act.

Philip Falk died on the 1st of February, 1890, and his will was proved in England by his widow, probate duty being paid on the estimated value of the whole partnership business, which was carried on in London and Adelaide as well as in Melbourne. Such estimated value included the value of the testator's share in the Melbourne business. The testator, however, possessed other assets in Victoria. The appellant was appointed by the widow to take out probate there, and in filing his statement under sect. 97 omitted the interest of the testator in the said partnership.

Present:—THE LORD CHANCELLOR, LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, and LORD SHAND.

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The facts are stated in the judgment of their Lordships, being those stated in the special case as well as in a supplemental case filed after the first argument herein by consent of counsel in the Privy Council Office.

The Supreme Court answered the above question in the affirmative.

Finlay, Q.C., and *Theobald*, for the appellant, contended that the partnership was an English partnership, and that the locality in which the business was situated was England. All the property of the partnership in Melbourne belonged to and formed part of the assets of the English firm. The testator's interest in that partnership was locally situated outside the Colony of Victoria, and therefore was not chargeable with probate duty in the Colony under the local Act. Such interest was recoverable from the surviving partners in England by virtue of the probate granted in England. Accordingly it was an asset of his estate locally situated in England; Victorian probate was not required in respect of any of the partnership assets in order to enable the testator's widow to recover or administer them. They referred to *Knox* v. *Gye* (1); to sect. 43 of 54 Vict. No. 1060; *Laidlay* v. *The Lord Advocate* (2); *Blackwood* v. *The Queen* (3); *The Queen* v. *Blackwood* (4), being the same case in the Court below; *Commissioner of Stamps* v. *Hope* (5); *Fernandes' Executors' Case* (6). It was one business carried on at different branches. There was only one capital. [LORD WATSON referred to *Walsh* v. *The Queen* (7).]

The Solicitor-General (*Sir John Rigby*), *Cozens-Hardy*, Q.C., and *Gurner*, for the respondent, contended that the interest of the testator in the assets of the partnership in Victoria was locally situate in the Colony, and therefore liable to probate duty. The English probate would not enable the executrix to exercise in Victoria any of her powers over such assets as are the subject of this appeal until auxiliary probate had been granted in the

(1) L. R. 5 H. L. 656.
(2) 15 App. Cas. 468.
(3) 8 App. Cas. 82.
(4) 7 Vict. L. R. Cases at Law, 400.
(5) [1891] A. C. 476.
(6) L. R. 5 Ch. 314.
(7) [1894] A. C. 144.

Colony, or until a verified copy of the English probate had been sealed by the Supreme Court under Part III. of the Act of 1890. Such local probate may not be necessary in order to enable the executrix to administer, but it is a condition precedent to her obtaining the aid of the Court in reference to any of the assets in the Colony. The Victorian assets are accordingly liable to the duty claimed, for probate cannot be obtained until such duty has been paid. The testator in his will refers to the business carried on at Melbourne as distinct from his other businesses; and being in that way separable from the body of assets situate elsewhere, it must be deemed to be locally situated in the Colony within the principle of *Walsh* v. *The Queen* (1).

Finlay, Q.C., replied.

1895
Jan. 29.

The judgment of their Lordships was delivered by

THE LORD CHANCELLOR:—

The sole question to be determined in this case is, whether the partnership interest of the late Philip Falk in the business of P. Falk & Co. at Melbourne was, at the time of his death, situate within the Colony of Victoria so as to be liable to probate duty.

An agreement of partnership was entered into on the 25th of September, 1888, between Philip Falk and his son J. D. Falk. It recited that Philip Falk had formerly carried on business in co-partnership with certain persons as merchants at Melbourne, and in co-partnership with certain other persons at Adelaide, and that both such businesses on the 1st of July, 1886, belonged to Philip Falk, and that he had also carried on business in London under the style of P. & S. Falk. It further recited that Philip Falk had agreed to take J. D. Falk into partnership with him "in the businesses so as aforesaid belonging to him."

The agreement contained provisions: (1.) That the parties should become co-partners in the trade or business of Australian and general merchants to be carried on at Melbourne and Adelaide, or such other places in Australia as might be mutually

(1) [1894] A. C. 144.

J. C. 1895 BEAVER v. MASTER IN EQUITY OF THE SUPREME COURT OF VICTORIA.

agreed upon, such business to be carried on under the style or firm of P. Falk & Co. (2.) That the parties should become partners in the trade or business of merchants to be carried on in London under the style or firm of P. Falk & Sons. (3.) That P. Falk should not be bound to attend to the affairs of the partnership otherwise than as he might think fit, and that J. D. Falk should attend personally to the affairs of the partnership in London, Melbourne, and Adelaide, as might be from time to time required by P. Falk. (4.) That P. Falk should be entitled to four-fifths of the net profits and J. D. Falk to one-fifth thereof, save that P. Falk was to be entitled to all the profits and was to bear all the losses arising from the trading in precious stones to be carried on in London by the partnership, paying J. D. Falk a commission in respect thereof. (5.) That, subject to the provisions with reference to the introduction of a son or sons of P. Falk into the business, in case a partner should die before the expiration of the term of partnership, and if the surviving partner should be desirous of purchasing the share of the deceased partner in the property credits and effects of the partnership, the value thereof should be ascertained by valuation in the manner prescribed, but in case the surviving partner or partners should decline to purchase the share of the deceased partner, then the property credits and effects of the partnership were to be realized, and the surplus after payment of the debts was to be divided between the surviving partner or partners and the representatives of the deceased partner according to their respective shares and interests therein.

The partners were both of them domiciled and resident in London. With some minor exceptions, to which it is not necessary to refer, all the goods sold by the firm at Melbourne were purchased by the partners in English and Continental markets. No sales were made in London except in connection with the business carried on in London under the firm of P. Falk & Sons. The business at Melbourne, as well as at Adelaide, was conducted by a salaried manager. The mode of carrying on business was for those managers to send to London a statement of the goods which in their opinion were required for their respective branches for sale in Australia, and the partners in London made purchases

accordingly in so far as the goods suggested by the Australian managers were approved by them. The vendors were instructed by the partners in London as to the shipment of the goods, and the invoices were paid by the partners there. The various goods shipped from England to Australia were invoiced by P. Falk & Sons in London to P. Falk & Co. in Melbourne or Adelaide as the case might be. In order to provide for the payment of the goods so purchased, it was the practice for the partners in London to cable to Melbourne or Adelaide in the first week of each month as to their commitments for purchases maturing on the 16th of the following month, and for Melbourne or Adelaide, as the case might be, to remit the amount cabled for so as to arrive in London about the time the commitments became due.

No record of the sales in Australia was entered in the London books. The books kept in Australia contained all particulars relating to them, and also to the expenditure incurred in Australia in carrying on the business. At the end of the year a balance-sheet was made out at Melbourne and Adelaide respectively, and forwarded to the partners in London. These balance-sheets shewed the net profits made at each place.

It was not the habit of the partners to enter the balance-sheets so forwarded in their London books, and such remittances as were made to the partners in London from Melbourne or Adelaide on account of interest on capital, or profits, were remitted in favour of the individual partner entitled to them, and do not appear in the firm's books in London.

Upon Arthur Lionel Falk, a son of Philip Falk, attaining his majority, he was admitted as a partner pursuant to a provision in the articles of partnership as from the 1st of July, 1889.

Philip Falk died on the 1st of February, 1890, having by his will appointed his widow and J. D. Falk and another executrix and executors. It was proved by the widow alone.

The Supreme Court of Victoria held that the interest of P. Falk in the business carried on at Melbourne was chargeable with probate duty in Victoria.

Their Lordships see no ground to differ from this conclusion. A review of the facts to which attention has been called appears to make it abundantly clear that the Melbourne business was

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locally situate there. It was entirely distinct from the London business, which was carried on under a different name. The London partners purchased, indeed, some of the goods sold in Australia in this country, but they purchased some of them on the Continent of Europe. The money to pay for these goods was in all cases remitted from Australia, and they were sold there. The materials necessary for making up a balance-sheet were to be found only in the books kept at Melbourne. The balance-sheet was made out there, and the interest and share of profits appearing therein as due to the partners respectively was remitted direct to each individual partner. These are the leading facts which establish in their Lordships' opinion that the interest of the testator in the business carried on at Melbourne was locally situate in the Colony of Victoria. That the several businesses carried on were regarded by the testator himself as distinct is clear from the provisions of his will. He empowers his trustees in their discretion to advance any sum not exceeding £25,000 to his son J. D. Falk, either alone or conjointly with any other person or persons, so long as he or they shall continue to carry on "the business of P. Falk & Co. at Melbourne now carried on by me in partnership with the said Julius David Falk, or to allow any part of my capital in such business to the extent of £25,000 to remain in such business." A similar power is given as regards the business of P. Falk & Co. at Adelaide. And the testator declared that the sum or sums "left in such businesses or either of them" should be considered as joint and several debts owing to his estate by the person or persons "for the time being carrying on such business respectively." The terms of the partnership agreement which have been quoted shew that the businesses were equally regarded as distinct by both the parties to that agreement.

Their Lordships will humbly advise Her Majesty that the judgment of the Supreme Court should be affirmed and this appeal dismissed. The appellant will pay the costs of the appeal.

Solicitors for appellant: *Linklater & Co.*
Solicitors for respondent: *Freshfields & Williams.*

[PRIVY COUNCIL.]

ATLANTIC AND NORTH-WEST RAILWAY COMPANY . . . . . } APPELLANTS;

AND

WOOD AND OTHERS . . . . . RESPONDENTS.

J. C.*
1894
Dec. 11.
1895
Feb. 23.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA.

Canadian Railway Act, 1888 (51 *Vict. c.* 29)—*Award—Appeal under s.* 161, *sub-s.* 2—*Review of Award by the Court.*

Where an award of compensation made in an arbitration under the Canadian Railway Act, 1888 (51 Vict. c. 29), was appealed from under sect. 161, sub-sect. 2:—

Held, that the Court rightly exercised its jurisdiction by reviewing the award as if it had been the judgment of a subordinate Court; that is by deciding whether a reasonable estimate of the evidence had been made. It was not authorized by the section to disregard the award and deal with the evidence de novo as if it had been a Court of first instance.

APPEAL from an order of the Court of Queen's Bench (April 26, 1893), reversing an order of the Superior Court of the Province of Quebec, district of Montreal (Nov. 17, 1891), and restoring an award under the Canadian Railway Act (Feb. 14, 1890).

The facts are stated in the judgment of their Lordships.

Blake, Q.C., and *Abbott*, Q.C., both of the Canadian Bar, for the appellants, contended that the Court of Queen's Bench was under the Act bound either itself to weigh and examine the evidence and decide upon it as in a case of original jurisdiction, not whether the award was manifestly incorrect and unreasonable, but what upon the evidence taken before the arbitrators was the just amount of damages; or in the alternative to remit the case to the Superior Court for its decision. Sect. 161, sub-sect. 2 of the Railway Act, is express that the Court shall decide on

* *Present*:—THE LORD CHANCELLOR, LORD WATSON, LORD MACNAGHTEN, LORD SHAND, and LORD DAVEY.

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the evidence as in a case of original jurisdiction; which it was submitted was not done, the Court having laid down the principle that the discretion of the arbitrators was not to be interfered with unless it had been exercised in an unreasonable or manifestly erroneous manner.

Vernon R. Smith, Q.C., and *Taylor* (of the Canadian Bar), for the respondents, were not heard.

1895
Feb. 23.

The judgment of their Lordships was delivered by

LORD SHAND:—

The appeal in this case is presented against a judgment of the Court of Queen's Bench for Lower Canada, reversing a judgment of the Superior Court in the district of Montreal. The subject of the litigation is an award in an arbitration under the Canadian Railway Act of 1888 (51 Vict. c. 29), by which the majority of the arbitrators awarded a sum of $16,308 as compensation for land taken and injury done to the property of the respondents by the appellant company, in the exercise of their statutory powers by the making of a railroad passing through the City of Montreal. The respondents are the trustees of Calvary Congregational Church, Montreal, and owners in possession of the property on which the church is built. A small part of the respondents' land only, consisting mainly of part of a lane leading to the rest of their property, was taken and occupied by the company, by their line being carried over it on trestles or arches, and much the greater part of the compensation claimed was on account of injury done to the remainder of the property by the use of the line in the working of the railway. The appellants maintained that they were not liable to pay compensation for injury so caused to the part of the property which was not taken, and stated other defences arising from the particular state of the respondents' title, but after much discussion these pleas were disallowed by the Court of Queen's Bench which reversed the judgment of the Superior Court by which the amount of compensation awarded had been greatly reduced. The decision on these points has been acquiesced in, and the only question on which any argu-

ment has been presented by the appellants under the present appeal relates to the nature of the review to be exercised by the Court, under the statute, of an award by arbitrators on the merits of a claim for compensation on which they have given their decision as to the amount of compensation to be paid.

The contention of the appellants on this question is thus stated in their case:—

"The appellants are willing to admit for the purposes of the present appeal that the construction of the railway over the lane in question constituted such an expropriation of a real right belonging to the respondents as to entitle the proprietors to recover under the Act such direct damages, contemplated by the Act, as are caused and to be caused to the remainder of the property by the intended use of such expropriated real right by the railway company; but they submit that the Court of Queen's Bench was under the Act bound either (1.) itself to examine and weigh the evidence and decide upon it as in a case of original jurisdiction, not whether the award of the arbitrators was manifestly incorrect and unreasonable, but what upon the evidence taken before the arbitrators was the just amount of damages, or (2.) to remit that question to the Superior Court for its decision."

The decision of the question depends on the meaning to be given to the 161st section of the Railway Act already mentioned, (sub-sect. 2) which is in these terms:—

"Whenever the award exceeds $400 any party to the arbitration may within one month after receiving written notice from any one of the arbitrators or the sole arbitrator, as the case may be, of the making of the award, appeal therefrom upon any question of law or fact to a superior court of the province in which such lands are situate, and upon the hearing of the appeal the Court shall, if the same is a question of fact, decide the same upon the evidence taken before the arbitrators as in a case of original jurisdiction."

It is maintained by the appellants that, where an appeal from the award of arbitrators involves questions of fact, the Court considering for themselves the evidence taken by the arbitrators ought to deal with the case as if the whole question of the

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amount of compensation to be awarded had come before them in the first instance, and ought not to pay regard to the decision of the arbitrators or to give weight to their award, as they might do in dealing with a decision on facts coming before them otherwise for review. The view maintained by the appellants is thus stated in their case:—

"Paragraph 2 of sect. 161 of the Railway Act is express that upon the hearing of the appeal, the Court shall, if the same is a question of fact, decide the same upon the evidence taken before the arbitrators as in a case of original jurisdiction. This, it is submitted, has not been done; but on the contrary, the Court appears to have laid down the principle that the arbitrators had a discretion which was not to be interfered with unless exercised in a manner unreasonable or manifestly incorrect. It is submitted that the arbitrators allowed an excessive and unreasonable amount of compensation, based upon exaggerated estimates of the value of the property and of its depreciation by the near presence of the railway, and upon the mere hypothesis, inadequately supported by evidence, that the church must and would be removed and a new one built in another place. . . . It is submitted that the Court was bound to examine and weigh the evidence on these various grounds of estimated damage, and to decide the case upon and in accordance with their own appreciation of that evidence and not the appreciation of the arbitrators, or to remit the case for such action by the Superior Court.

"The appellants . . . submit that the appeal should be allowed on the ground that neither of the Courts below has decided the facts according to the law now laid down upon the evidence as in a case of original jurisdiction, and that the appellants are entitled to such decision, and they submit that the case should be remitted for such decision to the proper Court, or that it should be so decided here, or that such other relief be granted to them as their Lordships may deem just."

In the evidence laid before the arbitrators there appears to have been a wide conflict of views, as is common in such cases, as to the nature and extent of the injury to be inflicted on the property of the respondents by the use of the railway. It

is sufficient for the present purpose to observe that several witnesses, whose evidence seems to have commended itself to the judgment of the arbitrators, considered that the church and the property on which it was built would be so injuriously affected by the use of the line in the running of trains that it might be necessary to have the church removed to another site to be acquired by the trustees, and in any view that serious injury was done to the property, and that a very substantial sum was due by way of compensation.

The view which the Court of Queen's Bench took of the evidence and of the arbitrators' award on the amount of compensation and the grounds of the award is expressed by Hall J. in delivering the judgment of the Court, Bossé J. dissenting. After laying down the principle that a railway company is bound to compensate a proprietor, not only for land actually taken but for the direct damage to his remaining land, "resulting either from construction and severance, or from the use of the railway line and the operation of its traffic service," the learned Judge added:—

"Applying that principle and the jurisprudence (1) I have quoted, to the facts of the present case, we must conclude that the arbitrators were justified in taking into consideration the injurious effect upon the present occupation of appellants' premises, resulting from the noise and vibration caused by the train service in such close proximity to their church. That it is a direct and tangible and appreciable damage, in the sense of the Act, will be apparent from considering the result if the appellants were the tenants only, and not the proprietors of the church in question. Would they be content to pay the same rental for the use of a church edifice thus situated as for one as free from disturbance as Calvary church was before the construction of the railway? Clearly not; and if its rental availability and value are diminished, certainly its use by its own proprietors has suffered a corresponding depreciation, for which it is possible to establish a pecuniary estimation and enforcement. Is that estimate which the present arbitrators

(1) This word is apparently here used in the French sense = doctrine of decided cases.—F. P.

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have made, judicious and suitable? In the face of the evidence adduced, it cannot be said to be unreasonable nor manifestly incorrect, and we do not feel warranted, therefore, by substituting our discretion for theirs, to adopt an estimate of damage which might be open to equal criticism, and even less defensible according to the evidence by which both they and we are bound."

From these observations their Lordships think it is clear that the Court for themselves fully considered and weighed the evidence taken before the arbitrators on the facts on which the amount of compensation depended, and decided the question of amount (which in such cases must generally be a matter of estimate) according to their own judgment. The learned judges, as the result of their examination of the evidence, came to the conclusion that if they were to adopt a different estimate of damage from that to which the arbitrators gave effect, the result might be liable to criticism equal to that to which the award was open (and to which it had no doubt been subjected in the argument) and their estimate might be even "less defensible, according to the evidence," than that of the arbitrators, and therefore they sustained the award, among the considerations stated in the formal judgment being the following, namely:—

"Considering that amongst the powers thus conferred is the right not only of expropriating the land of third parties and of laying tracks upon such expropriated land, but of operating a train service thereon.

"Considering that in the present case the maintenance of such train service will cause direct damage, loss, and inconvenience to said trustees, and greatly injure the use and enjoyment of their remaining property for church purposes to which use it had been applied and dedicated for many years prior to the date of said expropriation notice, and that the arbitrators acted within their legal powers and functions in taking into consideration not only the value of the expropriated premises, but the direct damage caused and to be caused to the remainder of the property by the intended use of such expropriated real right by said railway company."

The Court dealt with the award as one which it was their province to review on the facts as appearing on the evidence adduced before the arbitrators, and in so doing in the opinion of

their Lordships they acted rightly and in accordance with the statute. It would be a strained and unreasonable reading of the words of the statute "as in a case of original jurisdiction" to hold that the evidence was to be taken up and considered as if it had been adduced before the Court itself in the first instance and not before the arbitrators, and entirely to disregard the judgment of the arbitrators and the reasoning in support of it. Such a reading of the statute would really make the Court the arbitrators and the sole arbitrators in every arbitration in which an appeal on questions of fact was brought against an arbitrator's award. It appears to their Lordships that this was not the intention of the Legislature, and that what was intended by the statute was not that the Court should thus entirely supersede and take the place of the arbitrators, but that they should examine into the justice of the award given by them on its merits, on the facts as well as the law. Previously to this enactment the Court had power only to approve of or set aside the award of arbitrators. This might often cause much expense and inconvenience in renewed proceedings before the arbitrators, and the purpose of the Legislature seems to have been to enable the Court to avoid this, by giving power to make or rather to reform the award by correcting any erroneous view which the arbitrators might have taken of the evidence; that in short they should review the judgment of the arbitrators as they would that of a Subordinate Court, in a case of original jurisdiction, where review is provided for. And it is in this view worthy of notice that the enacting words of sub-sect. 2 of sect. 161 are followed by this provision of sub-sect. 3. "Upon such appeal the practice and proceedings shall be as nearly as may be the same as upon an appeal from a decision of an inferior Court to the said Court."

The Court of Queen's Bench has, in their Lordships' opinion, rightly acted on this view, and their Lordships will therefore humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the costs of the appeal.

Solicitors for appellants: *Bompas, Bischoff, Dodgson, Coxe & Bompas.*

Solicitors for respondents: *Bircham & Co.*

[1895] A. C. 264. TREW *v.* PERPETUAL TRUSTEE CO. | *Distinguished. In re* PLAYFAIR, DECD. [1951] 1 Ch. 4

[PRIVY COUNCIL.]

J. C.* 1895 *Jan.* 23; *Feb.* 23.

TREW . . . . . APPELLANT;

AND

THE PERPETUAL TRUSTEE COMPANY (PLAINTIFFS) AND OTHERS . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Will—Residuary Clause—Construction—Referential Trusts do not duplicate Charges.

Trusts of residue created by reference to other trusts are not to be read as creating a duplication of charges on the estate in the absence of the testator's clear intention to that effect.

Hindle v *Taylor* (5 D. M. & G. 577) approved.

Where a testator gave to his widow the interest of £20,000 during widowhood, and on re-marriage the interest of £10,000 for her life, the interest on the balance of the £20,000 to be in that case for the benefit of their children; "and as to all his residuary estate" gave it upon the same trusts as were declared in regard to the £20,000, and the widow re-married:—

Held, that the residuary clause did not operate to give to her either the income for life of a moiety of the residuary estate or of an additional £10,000.

APPEAL from a decree of the Full Court (Nov. 14, 1893) dismissing an appeal against part of a decree of the Chief Judge in Equity (June 23, 1893).

The question decided in this appeal is whether, upon the true construction of the will of Louis Samuel, deceased, which is sufficiently set out in their Lordships' judgment, the appellant, the widow of the testator, who has married again since his death, is entitled only to the income of a sum of £10,000, part of the estate of the said testator, as decided by the decree appealed from; or whether she is entitled in addition to such income to the income of either a further sum of £10,000 or of a moiety of the testator's residuary estate, as contended for by the appellant.

* *Present*:—THE LORD CHANCELLOR, LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, LORD SHAND, LORD DAVEY, and SIR RICHARD COUCH.

Cozens-Hardy, Q.C., and *Warmington*, Q.C., for the appellant, contended that the proper mode of construing the trust of the residuary estate is to read into that part of the will, mutatis mutandis, the trusts in the earlier part of the will declared of the £20,000 therein mentioned. The sum of £10,000, the income of which was in the event of the appellant's re-marriage to be given to her for her life, was part of the said sum of £20,000, and the trust for the payment of the income of the £10,000 was one of the trusts by the will declared with reference to the said sum of £20,000. Construing the residuary clause in that way, the result would be that one of the trusts of the residuary estate would be to pay the income either of half of the residuary estate, or at all events of £10,000, part thereof, to the appellant; while under the decree appealed from the residuary estate would not be held upon all the trusts declared in reference to the £20,000, but only on some of them, namely, those in favour of the children.

Warmington, Q.C., and *Vaughan Hawkins*, for the respondents, contended that both upon principle and authority a direction that fund B shall be held on the trusts already declared of fund A (the trustees being the same) does not mean that there are to be two distinct sets of trusts, or that charges or specific sums are to be duplicated; but means that the trusts declared of fund A are to extend to and govern fund B as if A and B together had in the first instance been so disposed of. In the ordinary case of a bequest of money to the trustees of a married daughter's settlement to be held on the trusts of that settlement, it could not be contended that the effect would be to double the amount either of fixed charges or of annual allowances. The effect would be to increase the fund which was answerable to the charges. So here, the £10,000 (of which the income is to be paid to the appellant after re-marriage) is not an aliquot part of the £20,000, but the income thereof is a fixed charge on the £20,000, and also (by virtue of the referential trust) on the ultimate residue.

Reference was made to *Hindle* v. *Taylor* (1); *Boyd* v. *Boyd* (2);

(1) 5 D. M. & G. 577. (2) 2 New Reports, 486.

J. C. 1895 TREW v. PERPETUAL TRUSTEE COMPANY.

Cooper v. *Macdonald* (1): see especially judgment of Lord Selborne, at p. 266.

Hardy, Q.C., replied.

1895. Feb. 23. The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

This is a suit for the administration of the estate of Louis Samuel, who died on the 29th of November, 1887, having made a will on the day of his death. The appellant, now Mrs. Trew, was his wife. The respondents are, his two children and a company appointed to be trustees of his will. The matter in question is the amount of interest given by the will to the appellant.

The testator first gave his whole estate to trustees upon trust to sell and convert it into money. It will conduce to clearness if his directions as to the application of the money, which in the will are written consecutively, are now quoted as separate clauses.

"(*a*) To pay the income of so much thereof as shall amount to the sum of £20,000 to my wife Mary Ruth Samuel during her life and so long as she shall remain my widow for her sole and separate use free from the control of any husband."

"(*b*) And from and immediately after her marrying again in trust to pay the income arising from £10,000 to my said wife for her life free from the control of any future husband as aforesaid."

"(*c*) And from and immediately after the death of my said wife to pay the income arising from the said £20,000 for the maintenance and education and advancement of all or any children of mine by my said wife whether born or to be born hereafter."

"(*d*) And in the event of my said wife marrying again to apply the interest of the balance of the £20,000 upon the trusts last hereinbefore declared."

"(*e*) And I further declare that the trustees shall subject to

(1) L. R. 16 Eq. 258.

the aforesaid trusts pay to each of my said children upon their attaining the age of twenty-one years, or upon their or other of their marriage one-half of the capital sum hereinbefore devised upon trust."

"(*f*) As to the residue of my said estate," he gives £10,000 to his brother Edward.

"(*g*) And as to all my residuary estate I give and bequeath the same upon the trusts hereinbefore declared with reference to the sum of £20,000."

The ultimate residue was large. It is stated by the appellant to amount to £34,000 or thereabouts. Her contention is that by virtue of clause (*g*) she is entitled for life to the income, either of the whole residuary estate, or at least of an additional sum of £10,000. For the children it is contended that on her second marriage she became entitled to no more than the income of one sum of £10,000.

The cause was heard before the Chief Judge in Equity, who declared that the appellant is entitled, in the events which have happened, to the income arising from £10,000, part of the estate of the said testator, during her life, and is not entitled to any further interest under the said will.

She appealed to the Full Court, who dismissed the appeal, Manning J. dissenting from his colleagues. She now seeks to reverse those adverse decrees.

It has hardly been contended here that the lady is entitled to the first alternative of her claim—namely, the moiety of the whole residue; but it is urged strongly that she is entitled to a second sum of £10,000 for her life. Their Lordships pass over the conjectures made as to the intentions of the testator not expressed in words. The will shews marks of hasty construction; but it is consistent enough with itself, and upon the point in question its literal construction presents no great difficulty.

Upon the literal construction the argument pressed in favour of the appellant is, to use the words of Manning J., that where there is a trust by reference "the only safe course to adopt is to re-write the words declaring such trust, merely substituting the second fund or property for the first." Then it is said that if the words "residue of my estate" be written in where the words

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"£20,000" occur, that will carry to the widow the income of the sum of £10,000 on her re-marriage.

But in the first place their Lordships cannot accept the proposed canon of construction in any sense which would give to it the general effect of multiplying charges upon the trust estate, or trusts in the nature of charges. Of course such may be the intention or effect of a particular will. But in the absence of anything in the will to shew such an intention, the rule is that the Court will not impute it to the testator. In the case of *Hindle* v. *Taylor* (1) Lord Cranworth held that in almost all cases it is not a reasonable way of reading a trust created by reference to other trusts to consider everything as there repeated, and so to make a duplication, as it were, of trusts in the nature of charges. This opinion has been recognised as sound in subsequent cases. That in this case the widow's interest after re-marriage is in the nature of a charge hardly admits of dispute.

In the second place, even supposing the suggested process were applied to this will, their Lordships cannot see how the appellant makes out her right to a second sum of £10,000. Let the residue be substituted for £20,000, as suggested, clause (*a*) would then carry the income of the residue to the widow, but only pending widowhood. Clause (*b*) does not relate to the £20,000, but to a substituted sum of £10,000. Clause (*c*) would give the income of the residue to the children at the death of the widow. Clause (*d*) would give the income of the balance of the residue to the children after the marriage of the widow. Clause (*e*) would give them at twenty-one or marriage one-half of the capital of the residue. It is one of the inaccuracies of the will that there is no express gift of the other half. It has probably been assumed by everybody that the gift of the whole income and an accelerated gift of half the capital implied that the whole capital was intended to be given ultimately. In all these prior provisions there is no gift to the widow after re-marriage, except in clause (*b*), and that is not expressed to be one of the trusts of the £20,000. There is no trust declared of "the £20,000" as a whole in favour of the widow after her second marriage. For the appellant it is contended that such a trust

(1) 5 D. M. & G. 577.

is implied in clause (*d*) by the expression "the balance of the £20,000." No doubt the widow's £10,000 would have to be answered out of the £20,000 or out of the bulk of the estate before any residue could be ascertained. Her interest is made to come first; and "the balance of the £20,000" means that part as to which no direction was given after the direction regarding the £10,000. But it seems somewhat fanciful to say that the introduction of clause (*d*) into the residuary gift would amount to a direction that another sum of £10,000 is to be taken out of the residue, and added to that which is alone given to the widow by clause (*b*) on her re-marriage.

This is what their Lordships find to be the result of actual introduction of the prior clauses into the residuary gift. If on the whole will there were any sufficient indication of an intention that the widow should on re-marriage take two sums of £10,000 effect could doubtless be given to it, though it might not be expressed in precise terms. But, as above observed, there is no such indication; the appellant is relying on the strictest literal construction, and that is found not to be in her favour.

The result is that the judgment below ought to be affirmed, and the appeal dismissed. The Courts below have thought fit to charge upon the estate the costs of the two former hearings. But it would hardly be right to burden the estate with the costs of a second fruitless appeal, and their Lordships must order the appellant to pay the costs. They will humbly advise Her Majesty accordingly.

Solicitors for appellant: *Collyer-Bristow, Russell, Hill & Co.*
Solicitors for respondents: *Want & Co.*

[PRIVY COUNCIL.]

J. C.*
1895
Jan. 25;
Feb. 23.

SIMPSON AND OTHERS . . . . . PLAINTIFFS;

AND

MOLSONS' BANK . . . . . DEFENDANTS.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, LOWER CANADA.

Bank Act, 18 *Vict.* c. 202 (*Canada*)—*Company not bound to see to Execution of Trust—Registration of Transfer of Shares—Notice of Trust.*

Where the respondent bank (incorporated by 18 Vict. c. 202), registered an absolute transfer of its shares which had been executed by trustees and executors under a will to one of the residuary legatees, regardless of a provision in the will directing the substitution of the legatee's lawful issue at his death, and the transferee disposed of the shares so as to defeat the rights of the issue:—

Held, that such registration, unless with actual knowledge of a breach of trust, was not wrongful, having regard to sect. 36 of the Act, which enacts that the bank is not bound to see to the execution of any trusts express, implied, or constructive to which any of its shares may be subject.

Notice that the shares were held by the trustees and executors in trust; possession by the bank of a copy of the will; the facts that transfers of other of its shares by the same trustees to other residuary legatees contained notice of substitution, that the president of the bank was also an executor of the will, and that the law agent of the bank was also law agent of the executors: *held* to be insufficient to affect the bank with the knowledge of the particular trusts sought to be enforced.

APPEAL from a decree of the Court of Queen's Bench (Feb. 27, 1894), affirming a decree of the Superior Court at Montreal (Oct. 6, 1892), dismissing the appellants' action with costs.

The facts are stated in the judgment of their Lordships.

The main question decided in this appeal was whether the respondent bank was, having regard to the provisions of its charter, affected by the existence of any trusts in favour of the appellants, or was it bound, or entitled to take notice of, or to inquire into, or to act upon the provisions of the will creating the same; and whether it was in consequence bound to refuse

* *Present*:—THE LORD CHANCELLOR, LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, LORD SHAND, LORD DAVEY, and SIR RICHARD COUCH.

registration of a transfer of its shares made in breach of such trusts.

Fullarton, Q.C., and *Daldy*, for the appellants, contended that the respondents in the circumstances were guilty of a breach of trust in registering a transfer of the shares in suit to the appellant, Alexander Molson, and in afterwards registering a transfer thereof from the said Alexander Molson.

The bank had notice of facts which made it their duty to hold their hand and make them responsible for the loss to the substitution occasioned by their acts. The shares in question stood in the testator's name for years till the 11th of May, 1866, when they were transferred by entry "to executors, viz. William Molson and Alexander Molson for transmission." It was contended that such entry on the face of it gave notice that the shares were the subject of a will which was in the public records and open to inspection. The word "executors" operated to that extent; the word "transmission," having regard to sect. 34 of the bank's Act (18 Vict. c. 202), operated to give notice that the shares were not the property of the executors, but belonged to legatees who alone were beneficially entitled. No attempt was made to prove that the officials of the bank exceeded their authority or that the bank was not fully acquainted with all that took place. It was contended that the evidence established that the bank had, by its agents and officers, notice that the transfers in which it participated and to which it gave effect, were not only irregular but illegal and fraudulent. Some of the bank agents were also agents of the executors. [*Blake* Q.C. referred to *In re European Bank* (1).] Reference was made to the bank's Act (18 Vict. c. 202), i.e., the Act incorporating Molsons' Bank, sects. 2, 19, 33, 34, 35, 36, and to the general Bank Act, 1871, s. 26, which contains a provision similar to that relied on in sect. 36 of the incorporating Act. Also to the Civil Code, Arts. 905, 913, 918, 919, 921, on which it was contended that testamentary executors in Canada are in a very different position from the executor of a trustee under an English will. They take no property at all in their testator's assets. They are

(1) L. R. 5 Ch. 358.

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"seised as legal depositaries" of the moveable property of the succession for a year and a day, or for such longer period as the testator may determine. But as a general rule they can only alienate the testator's property under an express power in that behalf conferred by the testator. They are entrusted with powers and not with property. These executors, therefore, had no property in the shares and no special power under the will to make such a transfer as was registered by the bank in this case; and the bank registered the transfers complained of in breach of its duty to those beneficially interested. Reference was made to *Carter* v. *Molson* (1), where the conduct of the executors was treated as a device for defeating the testator's intentions with respect to substitution and the insaisissibilité of his son's usufruct.

E. Blake, Q.C. (Canadian Bar), and *Tyrrell T. Paine*, for the respondents, were not heard.

1895 *Feb.* 23.

The judgment of their Lordships was delivered by

LORD SHAND:—

The Honourable John Molson died on the 12th of July, 1860, leaving a will dated the 20th of April of that year, and this appeal from a judgment of the Court of Queen's Bench for Lower Canada relates to 640 shares in the Molsons' Bank, Canada, which formed part of the residue of his estate. The complaint of the appellants is that the bank, the respondents, wrongfully registered in the books of the bank a transfer of these shares granted by William Molson and Alexander Molson, executors under the will, in favour of Alexander Molson, the testator's son, to the loss and injury of the appellants, as having right to have the shares secured to them under a substitution in favour of Alexander Molson's children contained in the will of their grandfather John Molson. Their claim of damages has arisen in consequence of the insolvency of Alexander Molson who transferred the shares in question to third parties who cannot be affected by the substitution founded on.

(1) 10 App. Cas. 664.

By his will Alexander Molson made the following provisions relative to the residue of his estate:—

"Tenthly. And as to the residue of my estate real and personal wheresoever the same may be and of whatsoever the same may consist of which I may die possessed or to which I may then be entitled I give devise and bequeath the same to my said brother William Molson of the said city of Montreal Esquire Mary Ann Elizabeth Molson my beloved wife and Alexander Molson my youngest son now living the survivors and survivor of them and the heirs and assigns of the survivor of them upon the several trusts hereinafter declared that is to say upon trust, firstly to hold administer and manage the said residue of my estate to the best advantage during the full term of ten years from and after the day of my decease . . . . secondly to sell and convey all such parts of my real estate as are not hereinbefore specially devised and as they shall deem it advantageous to my estate to sell and to grant deeds of sale and conveyance of the same to receive and grant receipts for the purchase moneys to invest the purchase moneys and all other moneys arising from or accruing to my estate and not already invested on good and sufficient security either by way of hypotheque or mortgage of or on real estate or by the purchase of Government stocks or stocks of sound incorporated banks so as to produce interest dividends or profits to secure the regular payment of the annuity payable to my said wife under her said marriage contract and the additional annuity hereinbefore bequeathed to her and generally to comply with and fulfil all other the requirements of this my will, and thirdly at or so soon as practicable after the expiration of the term of the said trust to account for and give the said residue as the same shall then be found to my residuary devisees and legatees hereinafter named.

"In all questions touching the sale and disposition of any part of my estate or the investment of moneys arising from my estate or accruing thereto the concurrence of any two of my said trustees of whom while living my said brother William Molson shall be one shall be sufficient."

"Thirteenthly. I further will and direct that at the expiration

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of the term hereinbefore limited for the continuance of the said trust the said residue of my estate real and personal as the same shall subsist shall under and subject to the conditions and limitations hereinafter expressed fall to and become and be for their respective lives only and in equal shares the property of my said five sons and at the death of each of my said sons or if any of them shall have died before the expiration of the said term the share of the one so dying or who shall have died shall become and be for ever the property of his lawful issue in the proportion of one share to each daughter and two shares to each son subject however to the right of usufruct thereof on the part of his widow if living for so long only as she shall remain his widow it is my will however that it shall be and I hereby declare it to be competent to each of my said five sons by his last will and testament or by a codicil or codicils thereto but not otherwise to alter the proportions in which by the foregoing bequest and devise a share of the residue of my estate is bequeathed and devised to his lawful issue and even to will and direct that one or more of his said lawful issue shall not be entitled to any part or portion of the said share of the residue of my estate anything herein contained to the contrary notwithstanding."

"Sixteenthly. And I further will and direct that as soon as it may be practicable after the expiration of the term hereinbefore limited for the continuance of the said trust the said trustees shall apportion and distribute the said residue of my estate to and among the parties entitled thereto as hereinbefore directed taking care in such apportionment and distribution to provide (as far as may be possible and in such manner as the said trustees may deem best) as well against risk of the capital of any of the shares being lost in the hands of any holder thereof under substitution or as usufructuary thereof as against risk by reason of my said engagement under the marriage contract above referred to of my sons John and Alexander and if in making the apportionment and division of the said residue the said trustees shall deem it necessary or advantageous to sell any part of the said residue and in lieu thereof to apportion and divide the net proceeds of the sales thereof it shall be competent

for them so to do anything hereinbefore to the contrary notwithstanding."

The widow of the testator died in 1862. By her husband's will she was entitled to appoint a trustee and executor to succeed to her and act in the trust in her stead after her death, and in May, 1861, professing to exercise this power, she executed a deed by which she nominated Joseph Dinham Molson, one of her sons, to be a trustee and executor. For some reason which does not appear his appointment was objected to by the testator's brother William Molson, one of the two executors named in the will, and though on the 17th of April, 1863, he served a notice of his appointment on the executors, he took no further steps to insist on his claim to act, and never did act as a trustee; so that William Molson, the testator's brother, and Alexander Molson, the testator's son, were in point of fact the only trustees and executors who acted in any way in the trust after the death of the testator's widow.

The shares in question were part of a larger number, namely, 3,200 shares of the bank which belonged to the testator at his death. The dividends on all of these shares were paid as they fell due to the testator's trustees and executors, but it was not till the 11th of May, 1866, that the shares were transferred to them in the books of the bank. On that date the transfer was made by a journal entry to this effect: "Declaration number twelve dated 11th of May 1866 Honourable John Molson" (that is the name in which the stock stood) "debtor to executors, viz. William Molson and Alexander Molson for transmission, three thousand two hundred shares of stock of fifty dollars each, one hundred and sixty thousand dollars."

The period of ten years for which the trustees were directed to hold and administer the residue of the estate expired on the 12th of July, 1870, and early in 1871 the executors prepared and submitted to the parties interested a statement of accounts, shewing their receipts and expenditure in the execution of the trust, and a statement of the assets of the residuary estate, including the 3200 shares in the bank. Some time thereafter, namely, on the 5th of April, 1871, five transfers each for 640 shares granted by the executors were executed and duly

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registered in the bank's register of transfers. The transfer now in question and acceptance thereof were in the following terms:—

"Schedule No. 39.

"For value received from Alex. Molson of Montreal we do hereby assign and transfer unto the said Alex. Molson six hundred and forty shares on each of which has been paid fifty dollars currency amounting to the sum of thirty-two thousand dollars in the capital stock of the Molsons' Bank subject to the rules and regulations of said bank.

"Witness our hands at the said bank this fifth day of April in the year one thousand eight hundred and seventy-one.

"(Signed) William Molson } Executors late
"(Signed) Alex. Molson } Hon. John Molson.

"I do hereby accept the foregoing assignment of six hundred and forty shares in the stock of the Molsons' Bank assigned to me as above mentioned at the bank this fifth day of April one thousand eight hundred and seventy-one.

"(Signed) Alex. Molson."

A transfer was made in favour of John Molson, another of the testator's sons, of 640 shares in the same terms, while in the case of the other three members of the testator's family the transfers were given in the name of a person or persons designed as "tutor," or as "tutor and curator," or trustee, with an acceptance of the stock signed by the transferee or transferees in that character, with the view of marking the stock in the hands of the transferee as being subject to a trust or substitution. There were thus two transfers in favour of the transferees, Alexander Molson and John Molson respectively, unqualified, and three transfers in favour of other members of the family, qualified in the way now stated. There have been produced in evidence certain deeds executed by the executors, by which a trust or substitution was created in regard to the shares included in each of the three last-mentioned transfers, so as to preserve the shares for the testator's grand-children, subject to their respective parents' right to the dividends during their lives; but these deeds were not in any way communicated to the bank.

The first ground on which it was maintained in the argument for the appellants, that the bank had no right to register the transfer now in question in favour of Alexander Molson, was that the executors of John Molson had no power to grant any transfer of the shares in question after the lapse of ten years prescribed for administration. It was argued that the title of the trustees and executors was limited to administration, and was of a temporary nature only, expiring at the end of the ten years after the testator's death, during which they were directed to hold and administer and convert parts of the estate, and that the testator's sons, and their children respectively substituted to them, took their shares of the residue including the bank shares by direct gift and bequest from the testator under his will, which superseded and extinguished all title in the trustees and executors to grant any transfers. Their Lordships are clearly of opinion that there is no ground for this argument. It is true that the will provides under the head "thirteenthly," that after the lapse of ten years from the testator's death the residue of his estate shall fall to and become the property of his respective sons and their families substituted to them. But the legal interest in the whole estate real and personal was vested by words of direct devise and bequest in the trustees and executors, who had to make up their title, as they did, to the bank shares for an administration directed to be continued for ten years; and at the end of that time these gentlemen were directed to divest themselves by "giving," that is by conveying or transferring the respective shares to the sons and their families, after settling the particular allocation and distribution which was to be made of the different parts of the residue of the estate. The sons and their families, whilst having right to their respective shares under the will, were thus to acquire the legal title from the trustees in whom it had been vested for ten years. This appears clearly from the whole scheme of the will, and from nothing perhaps more clearly than the provision which was so strongly pressed upon their Lordships' notice, directing that the trustees and executors should take care to provide against the risk of the capital being lost in the hands of the testator's sons to the prejudice of their children, which they would do by

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a transfer of the legal interest in the different parts of the estate vested in them.

Assuming then that the title was to be granted by transfer from the trustees (and it is not easy to see how any title could otherwise be obtained after these gentlemen had been themselves registered as shareholders), it was maintained, not only that the trustees and executors were bound to execute transfers in such terms as would either give effect to the substitutions directed in the will in favour of Alexander Molson's grandchildren, or would at least give notice to any purchaser from Alexander Molson that the shares were affected by substitution, but further that the bank were bound to refuse to register the transfer in question because of the absolute terms in which it was expressed. Their Lordships have not thought it necessary to call for any answer to the appellants' argument on this point, as they entertain no doubt that the decision of the Court of Queen's Bench on this question should be affirmed.

It must be here observed that a question was raised in the Courts below, as to whether the substitutions provided for by the testator in his will, in so far as regards moveable estate, including the shares in question, could be made effectual under the law of Canada. Taschereau J., before whom the case came in the first instance, held that the substitution could not be made effectual. This judgment was reversed on appeal, the learned judges holding that the substitution could be made and was directed in such terms as might have been carried into effect. The point is fully argued in the respondents' case, but the question has not been the subject of argument before this Board. For the purpose of the present appeal their Lordships will assume that it was the duty and in the power of the trustees and executors to see that either by transfers qualified as in the case of certain of the other children, or in some other way the substitution was provided for or declared.

The argument of the appellants involves the consideration of two questions; first, whether the bank had any notice, and if so what notice, of the trust created by the testator's will, in so far as the testator directed substitutions to be made to affect the divided parts of the residue of his estate; and, secondly, whether

if the bank had notice it was such as to make it the duty of the bank to refuse to register the transfer in question because of the absolute terms in which it was expressed.

The statute incorporating the Molsons' Bank (18 Vict. c. 202) contains this provision in sect. 36, viz., "The bank shall not be bound to see to the execution of any trust whether express, implied or constructive to which any of the shares of the bank may be subject." This language is general and comprehensive. It cannot be construed as referring to trusts of which the bank had not notice, for it would require no legislative provision to save the bank from responsibility for not seeing to the execution of a trust, the existence of which had not in some way been brought to their knowledge. The provision seems to be directly applicable to trusts of which the bank had knowledge or notice; and in regard to these the bank, it is declared, are not to be bound to see to their execution.

Apart from the provision of the statute, it may be that notice to the bank of the existence of a trust affecting the shares would have cast upon them the duty of ascertaining what were the terms of the trust; and that in any question with the beneficiaries, whose rights had been defeated by the absolute transfer in favour of Alexander Molson, the bank, whether they had inquired or not, might have been held to have constructive knowledge of all the trust provisions. Assuming this point in favour of the appellants, their Lordships, however, see no reason to doubt that by the clause in question the bank are relieved of the duty of making inquiry, and that they cannot be held responsible for registering the transfer, unless it were shewn that they were at the time possessed of actual knowledge which made it improper for them to do so until at least they had taken care to give the beneficiaries an opportunity of protecting their rights. In the present case their Lordships are satisfied that at the date of the transfer the bank had not any notice which could warrant the inference that they were aware that a breach of trust was intended or was being committed. What amount of knowledge would be sufficient to imply that the bank must know that a transfer is in breach of a trust is a question which must depend on the circumstances of each case. In the present case, their

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Lordships do not find it necessary to consider what might be the legal effect of their having such knowledge, because they are satisfied that at the date of the transfer in favour of Alexander Molson the bank had not any notice which was sufficient to bring to their knowledge, or to lead them to believe, that any breach of trust was being committed or intended by the trustees or executors under the will.

The bank had notice that the shares in question were acquired and held by William Molson and Alexander Molson in the character of trustees and executors for the execution of trust purposes. The entry of the transfer of the shares by transmission was made in their names as executors in the bank's books, and the will of the testator, in virtue of which the transfer entry was made, directly gave, devised, and bequeathed the shares to them as trustees and executors for the execution of trust purposes. But it was maintained by the appellants that the bank had further notice, not only of the general trust created by the will, but of the terms of the particular trust in favour of Alexander Molson's children directed by the testator to be provided for by the trustees by way of substitution of them to their father, Alexander Molson.

Their Lordships are, however, of opinion that it has not been proved that the bank had any notice of this particular trust purpose, or at least any notice which could affect them with knowledge of the way in which it ought to have been executed by the trustees. The facts alleged and relied on by the appellants as proof of such notice were (1.) that a copy of Alexander Molson's will was in the possession of the bank; (2.) that in the case of the families of three of the testator's children notice of the substitution of grandchildren was contained in the transfers by the executors registered in the bank's books in April, 1871; and (3.) that William Molson, the testator's brother and one of the executors, was president of the bank, while Mr. Abbott, the law agent of the executors, was also the bank's law agent, and as both of these gentlemen must be taken to have been fully aware of the detailed provisions of the testator's will, the bank through them, as its officers, had full knowledge of the trust. It is clear, however, that these facts are quite insufficient to prove the alleged notice.

The evidence does not clearly shew how the bank came into possession of the copy of the testator's will, which was produced by Mr. Elliott, the local manager. It may have been left with the bank, as evidence of the title of the executors to receive the dividends on the shares which were paid to them from the first after the testator's death, or it may have been given to the bank six years afterwards when the executors desired to have their title as owners by transmission registered in the bank's books. It appears that on this last occasion a notarial declaration of the executors' title, which has not been produced, was presented to the bank, in compliance with the provisions of their charter, and the probability is that the copy of the will was then given to the bank as evidence of the executors' right to have the shares transferred to them. The production of the will or probate at that time would be in accordance with the usual practice, which entitles the bank to require evidence by production of the title in virtue of which the entry of any transfer of shares in the bank's books is asked. But the only question with which the bank were concerned was that of legal title. They had to satisfy themselves only that the will gave a right to the shares which entitled the executors to be registered as owners. They were not called upon, on an application to enter a transfer by transmission of the bank's shares, to examine the will with reference to an entirely different matter which did not concern them, namely, the testator's directions as to the ultimate destination and disposal of his estate; and there is no reason to suppose that anything more was done on this occasion than is usual in such cases. Again, the entries of transfers in favour of other members of the testator's family, in terms differing from that in favour of Alexander Molson, was not a circumstance calling in any way for the notice or attention of the bank, and even if observed these gave no notice to the bank that the shares transferred to Alexander Molson and to his brother John were held under similar trusts, to which effect should be given. It might well be that in the allocation and distribution of the residue entirely different arrangements would be in compliance with the testator's directions. Nor can the knowledge of Mr. William Molson as a trustee and executor, and of Mr. Abbott as law

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agent in the execution of the testamentary directions of the deceased, and the execution of the transfer in question, be imputed to the bank so as to affect them with liability. It is not proved that these gentlemen or either of them intervened in any way in reference to the registration of the transfer in favour of Alexander Molson. But, apart from this, their knowledge was not that of the directors or manager of the bank. They were clearly not agents of the bank, so that notice to them could be regarded as notice to the bank.

Their Lordships will on these grounds humbly advise Her Majesty that the appeal ought to be dismissed, and the appellants must pay the costs.

Solicitors for appellants: *Freeman & Bothamley.*
Solicitors for respondents: *Paines, Blyth, & Huxtable.*

[PRIVY COUNCIL.]

J. C.* 1894 Dec. 4, 5, 6, 7. 1895 Feb. 9.

CASGRAIN . . . . . APPELLANT;

AND

ATLANTIC AND NORTH-WEST RAILWAY COMPANY AND THE CITY OF MONTREAL, A PARTY INTERVENING . } RESPONDENTS.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA, PROVINCE OF QUEBEC.

Law of Lower Canada—Art. 997, *Code of Civil Procedure—Information—Power of Attorney-General to discontinue—General Railway Act, c.* 109 *of the Revised Statutes of Canada*, 1888, *s.* 12.

Art. 997 of the Civil Procedure Code relates on its true construction, not to every illegal act done by an association therein mentioned, but only to such acts as are professedly or manifestly done in the assertion of some special power, franchise, or privilege not conferred upon it by law.

Where an information under that article alleged that the respondent company had closed a public lane under the pretext that they had acquired private interests therein which entitled them so to do, *held*

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* *Present*:—THE LORD CHANCELLOR, LORD WATSON, LORD MACNAGHTEN, LORD SHAND, and LORD DAVEY.

that this did not amount to an allegation that they closed it in the exercise of any power, franchise, or privilege within the meaning of the article :—

Held, also, that the Court has jurisdiction under art. 998 to prohibit the issue of a writ of information under art. 997; but that after issue the Attorney-General is dominus litis, and can discontinue proceedings or control their conduct and settlement independently of any private relator :

Held, that, assuming the lane in question to have been a public one, the respondent company were entitled to close, occupy, and use it with the assent of the city council, which assent was empowered by sect. 12 of the General Railway Act, c. 109 of the Revised Statutes of Canada, 1888.

APPEAL from a decree of the Court of Queen's Bench (Dec. 23, 1892) reversing a decree of the Superior Court for Lower Canada, sitting in Montreal (May 16, 1891).

The facts and proceedings are stated in the judgment of their Lordships.

The Court of Queen's Bench decided :—

(1.) That it was not established that the respondents had assumed any power, franchise, or privilege which did not belong to them, or which had not been conferred upon them by law.

(2.) That articles 997 and 998 of the Code of Civil Procedure were not applicable to the case, and did not authorize the presentation of the petition or the conclusions taken by it, and that the superior Court had not authority to adjudicate upon the conclusions of the petition.

(3.) That the Attorney-General could, as he did, withdraw his consent to the petition and ask to be dismissed from Court, and that the superior Court could not force him against his will to continue the litigation under the petition. That the Court could not question the reasons which the Attorney-General gave for his abandonment of the petition—namely, the fact that private interests only and not the public interests were in question ; and that it was not a case for the application of the above-mentioned articles of the Code of Civil Procedure, but for a recourse before the Courts in the ordinary manner, and that if the Court did inquire into the reasons, it appeared that they were well founded.

(4.) That a writ of mandamus would not lie against the Crown, or against its officers as such.

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Bompas, Q.C., and *Hohler*, for the appellant, argued that Blache Lane had been shewn by the evidence and the Acts relating thereto to be a public street. Reference was made to the city charter of Montreal and amending Acts as to the effect of the register of streets and homologation. See also Quebec Act, 37 Vict. c. 51, ss. 123, 167, et seq.; Quebec Act, 42 & 43 Vict. c. 53, ss. 21, 23. The earlier repealed Acts were also referred to on this question: 39 Geo. 3, c. 5, ss. 27, 28; 23 Vict. c. 72, s. 10. The respondents are a corporation incorporated by Dominion Act, 42 Vict. c. 65, for the purpose of making a railway passing through Montreal, and are subject to the provisions of the General Railway Act being the Revised Statutes of Canada, c. 109. They had no power to entirely close a public street even with the consent of the corporation, and could not interfere with it at all without such consent being formally given, and there was no formal consent given to interfere with Blache Lane. Sect. 2 (*h*), sect. 8, sub-sect. 30, and sect. 12 were referred to in support of this contention. That Act was repealed, and 51 Vict. c. 29, substituted, after the works were completed, but before these proceedings were taken. The evidence required to prove a street to be a public street in Montreal was dealt with in *Octave Chavigny de la Chevrotière* v. *La Cité de Montréal* (1). By the law of Lower Canada the property in public streets is vested in the municipality, and not in the adjoining owners; and the respondents carried their railway along Blache Lane without the leave of the municipal authority, and otherwise illegally obstructed it. If Blache Lane were a private lane the respondents had no right to take possession of it without proper proceedings in expropriation and the payment of compensation. They infringed the Acts of Parliament by which they were governed, and exercised a power, franchise, or privilege which did not belong to them.

Next, the Attorney-General had no right to discontinue the proceedings, at least without the consent of the Court. There was never, in fact, a valid discontinuance, for his notice thereof was irregular and invalid, claiming to discontinue without costs: see Code of Civil Procedure, ss. 450–3; *Molleur* v. *Dougall* (2).

(1) 12 App. Cas. 149. (2) 33 L. C. J. 105.

The discontinuance was filed after communication from the respondents and without giving the relator, who had incurred heavy costs, any opportunity of explanation. The superior Court was right in ordering the action to be revived in the name of a succeeding Attorney-General, and in holding that the late Attorney-General could not withdraw permission to use his name without the authority of the Court. [LORD WATSON:—Was the Attorney-General dominus litis or the Court?] The Attorney-General had no discretion as to discontinuance: see *Attorney-General* v. *Great Northern Railway Company* (1); Third Institutes, c. 105, p. 237. Even according to English law the Crown cannot pardon in proceedings with reference to a nuisance, and therefore the Attorney-General cannot. See also Pigeau, Désistement, vol. i., p. 348. As to the duties of the Attorney-General of Quebec, see 14 Geo. 3, c. 83, s. 8; 30 & 31 Vict. c. 3, ss. 58, 63, 83, 130, 134, 135. Reference was made to *Johnson* v. *Archambault* (2), a case relating to this Blache Lane, and holding it to be a public street.

E. Blake, Q.C., and *Abbott*, Q.C. (both of the Canadian Bar), for the respondents, contended that the Attorney-General had an absolute discretion as to discontinuance and as to the control of the proceedings while they lasted: see *Brown* v. *Gugy* (3). English law and not French law governs the rights and duties of the Attorney-General. He, and not the Court, was dominus litis: see Revised Stat. Quebec, 1888, arts. 702, 3. The leave of the Court is not required. With regard to his power under the Code to institute such proceedings as these, the intention of article 997 was that he should in his discretion prosecute a corporation for penalties or forfeiture of their charter where the corporation had rendered itself liable to these results; but it was not intended that he should take proceedings for the demolition of structures and obtain power to demolish them himself. This is a special proceeding, and as the respondent company was incorporated by a Dominion Act and is alleged to have violated the Dominion Railway Act, the proceedings, if competent, should

(1) 29 L. J. (Eq.) 794. (2) 8 L. C. J. 317.
(3) 2 Moo. P. C. (N.S.) 341.

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have been taken by the Attorney-General for Canada. And since the Parliament of Canada had established a special tribunal for the trial of cases of this description, namely, the Railway Committee of the Privy Council of Canada, under 51 Vict. c. 29, this proceeding should not have been permitted having regard to sect. 11 (*h*). The action, moreover, was improperly brought on another ground, namely, that the City of Montreal was not made a party, and its subsequent intervention did not cure the original defect; besides, its intervention having been dismissed, it is no longer a party, and the order sought cannot be made. The city surveyor had duly authorized the respondents to build the railway on their lane in question. The evidence did not establish that Blache Lane was a public street, but a private lane for adjoining proprietors. If a public street, it was contended that the respondents had sufficiently complied with the requirements of the Railway Act, besides obtaining the consent of the city: see *Reg.* v. *Grand Trunk Railway Company of Canada* (1); *Re Day and the Town Council of Guelph* (2); *Corporation of Pembroke* v. *Canada Central Railway Company* (3); *Attorney-General* v. *Sheffield Gas Consumers* (4).

Bompas, Q.C., replied.

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The judgment of their Lordships was delivered by

LORD WATSON:—

In this case their Lordships heard a very full argument upon a great variety of questions. They have not found it necessary to decide all of these questions; but they have thought it right to express their opinion upon some points, the decision of which is not, in the view which they take, necessary to the disposal of the appeal.

It is impossible to appreciate the various questions presented for decision without referring in detail to the circumstances in which these have arisen, and also to the peculiar course of the present litigation in the Courts below. Before adverting to these proceedings their Lordships will notice certain facts which are

(1) 15 Upper Canada Q. B. 121.
(2) 15 Upper Canada Q. B. 126.
(3) 3 Ont. Rep. 503.
(4) 3 D. M. & G. 304.

either not in dispute or have, in their opinion, been established by evidence.

The respondent company were incorporated by an Act of the Dominion Legislature which empowered them to carry their line of railway through the city of Montreal. For effecting that purpose they proposed to take and use a rectangular piece of ground (hereinafter referred to as "the area"), lying between Mountain Street and Bisson Street, two of the public streets of the city, which run parallel to each other. There was a lane wholly situated within the area known as Blache Lane, which opened off Mountain Street and terminated in a cul-de-sac. The lands abutting on the lane belonged to private individuals, by whom it was used as an access to their properties. The company duly expropriated such parts of these properties as lay within the area and had a frontage to the lane, and thus acquired the right to exclude all access to Blache Lane, except from Mountain Street.

The company submitted to the city council for approval a plan of their contemplated works which shewed, inter alia, that the line of railway was to be carried over Mountain Street by means of a bridge, one of the abutments of which completely closed the entrance to Blache Lane from Mountain Street. It also shewed that the whole area, including the solum of Blache Lane, was to be occupied and used for railway purposes. The company also applied to the council for leave, instead of carrying their railway by a bridge over Bisson Street, to close and occupy that part of the street which adjoins the area, offering at the same time to protect the city from all claims of damage resulting from the closing of the street.

The plan in question and the application for leave to close Bisson Street were remitted to the road committee of the council, who recommended that the company should be permitted to make bridges over Mountain Street and other streets as shewn on the plain; and that they should be allowed to close Bisson Street upon certain conditions, which need not be specified. On the 20th of February, 1888, the plan and application, together with the report of the road committee, were considered at a special meeting of the city council, called for

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that purpose, when the report was unanimously adopted, with the exception of the recommendation with regard to Bisson Street, which was sent back to the committee for further consideration. It is unnecessary to notice what followed upon the remit. It is sufficient to say that the crossing of Bisson Street was subsequently arranged.

After receiving the assent of the council the company proceeded with the construction of their line; and before the end of the year 1888 the railway was formed across Mountain Street upon the area in question, and across Bisson Street. In the course of these operations the whole of the area, including the old site of Blache Lane, was covered by an embankment of considerable height, in order to bring it up to the proper level of the railway road.

In the month of February, 1889, after the railway had been for some time in actual operation, the company were served with a writ of information, bearing to be in terms of article 997 of the Civil Procedure Code for Lower Canada, at the instance of the Hon. Arthur Turcotte, who was at that time Attorney-General for the Province, which prayed that the company should be condemned to open Blache Lane and leave it free for public use, and that, in default of their so doing, the same should be opened to the public at their expense. It was set forth in the writ that the proceeding had been instituted by the Attorney-General at the request of William Walker, one of the proprietors whose land fronting Blache Lane had been expropriated by the company, who had found security to indemnify the Government against costs, in accordance with the provisions of article 997. It appears that the Attorney-General had, upon the 4th of January, 1889, given Mr. Walker's solicitors a written mandate authorizing them to prosecute the company in his name.

In view of the objections which are urged by the company against the competency of the proceeding, it becomes necessary to notice the averments which are made on behalf of the Attorney-General in support of the conclusions of his writ.

The first and cardinal averment is, that Blache Lane was a public street, and had been so from time immemorial. That is followed by an allegation that the company, after they had

acquired by expropriation the land abutting on the lane, "under pretext that thereby all rights of servitude in favour of proprietors abutting on said street had become vested in the said company alone," had closed the lane at its intersection with Mountain Street, and had made all ingress and egress impossible to the public in general. That statement imports that the company justified their operations, not upon the ground that the lane was the property of the public, and that they were possessed of some power, franchise, or privilege which enabled them to close it at their own hand, but on the ground that it was private, and that they had acquired all the servitudes of way by which it was affected.

The next averment is to the effect that the closing of the street was particularly damaging to Mr. Walker and the other proprietors whose lands had been in part expropriated; that the expropriation was made "on the distinct understanding that the said properties would not, by reason of the said expropriation, lose their frontage on a street"; whereas, by reason of the closing of Blache Lane, these properties had "no outlet whatever in rear." The street contemplated in the "distinct understanding" was obviously not Blache Lane; and the evidence supplies the information that it was a new street which Mr. Walker alleges the company undertook to make for his and others' convenience as part of the compensation for the lands which had been taken by compulsion. It is difficult to conceive of what relevancy these averments can be in an action brought by the Attorney-General for the public interest. They relate exclusively to the rights of Mr. Walker and others to be compensated for lands which had been expropriated by the company; and their introduction is calculated to beget a suspicion that the prosecution on behalf of the general public was expected to promote the enforcement of these private claims. It is manifest that the interest of the public in the opening of Blache Lane was infinitesimal. Even if the lane were opened to Mountain Street they could derive little or no advantage from it; and, if the consent given by the city council to the construction of an abutment which closed the entrance from Mountain Street were valid, their privilege of using Blache

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Lane would consist in the right to perambulate the bottom of a pit, which they could only reach by means of a balloon or some similar contrivance.

The next and last averment is simply a plea in law, which sets forth that the closing of Blache Lane constituted, in the circumstances previously detailed, "the exercise by the said company of a power, franchise, and privilege which does not belong to it, or is not conferred upon it by law, and is a case governed by article 997 of the Code of Civil Procedure for Lower Canada."

In their defence the company denied the allegations of the petitioner, and averred that Blache Lane was private property and that Mr. Walker, and all other persons whose lands fronting the lane had been expropriated, had been fully compensated, on the footing that the lane was to be closed and occupied for railway purposes. They also pleaded by way of demurrer that the allegations made in the writ were insufficient in law to support its conclusions. After hearing parties upon that plea, Mathieu J., on the 29th of March, 1889, reserved it for consideration along with the merits of the cause.

On the 10th of September, 1889, the city council of Montreal presented a petition for leave to intervene in the suit. The company opposed the petition, upon the ground, mainly, that the suit was one brought under article 997 of the Code, and that the terms of the article do not warrant the admission of any party other than the Attorney-General to take part in its prosecution. Their objections were overruled, and the city council were allowed to intervene in the cause "for the purpose of watching the proceedings, taking such conclusions or making such declarations therein as they may be advised."

On being thus admitted, the council filed grounds of intervention. These consist of a detailed statement of facts tending to shew that Blache Lane was one of the public streets of the city; and they conclude by preferring a claim against the company, which they were allowed to support by proof, for the sum of $20,000, as damages already sustained by the city through the closing of the lane. The statement is certainly not characterised by an excess of candour. It carefully avoids all

reference to the fact that the council themselves had sanctioned the exclusion of the public from the lane by authorizing the only public access to it to be closed. From the date of their intervention until the present appeal was brought the council appear to have taken a very active part in the litigation, and a large proportion of the proof led was adduced by them.

On the 31st of July, 1890, the Hon. Arthur Turcotte, as Attorney-General, lodged in Court a notice, signed by himself, in these terms: "Arthur Turcotte, the said petitioner, hereby discontinues the present action without costs, and prays acte of this, his said discontinuance." On the same day he gave notice of his intention to discontinue to Mr. Walker's solicitor, who had till then conducted the case on his behalf, by a letter, in which he explains his reasons for taking that step, as follows: "Careful inquiry has satisfied me that aside from the interest of these gentlemen" (i.e., Mr. Walker and others in his position) "there is no public general interest which requires the reopening of this lane. The private relator, at whose request I instituted the prosecution above mentioned, having chosen, along with the parties interested with him, to resolve his remedy to have the lane reopened into an action to recover the damages caused him by its being closed, I must refuse to allow my name to be further used in this prosecution, which is now being evidently pushed solely with the object of forcing the payment of the damages sought to be recovered in the private suits."

At this time the proofs for the Attorney-General, the interveners, and the company had been practically completed. Nearly the whole of the evidence led for the Attorney-General consisted of productions and oral testimony bearing upon the averments made in the information with respect to the private interests of Mr. Walker and others, the obligation said to have been undertaken by the company to give them a new road as an access to their properties, and the amount of the damages which they had suffered by reason of their not getting that access. Amongst his witnesses there were three gentlemen who had acted, two of them as arbitrators and the other as umpire, in assessing the compensation due to Mr. Walker; and their Lordships observe, with regret, that these gentlemen were subjected

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to an irregular and improper examination, by counsel representing the Attorney-General, as to the reasons and motives by which they were influenced in making their award. His evidence also disclosed the fact that Mr. Walker had, on the 3rd of February, 1889, raised, and was still pursuing, an action, concluding to have it declared that the award was made on the condition and understanding that his property, after expropriation, was to be bounded by a new street fifty feet wide, and also to have the company condemned to pay him damages in respect of their failure to fulfil that condition.

Mr. Walker, the relator, after the discontinuance was filed, presented an incidental petition to the Court praying that a writ of mandamus should issue "in this cause" commanding Mr. Turcotte, in his capacity of Attorney-General, to withdraw his discontinuance, and to allow the petitioner to obtain a final judgment upon the merits of the writ of information. The grounds upon which the application was made were substantially these: that the discontinuance of the action was the result of a corrupt agreement between the Attorney-General and the company; that, in the circumstances of the case, the Attorney-General was bound by law to prosecute, at the relation of any citizen of the city of Montreal; and that, if the Attorney-General had any discretion as to discontinuing the suit, which was denied, such discretion had not been properly exercised, and could be controlled by the Court.

Notwithstanding the opposition of the Attorney-General, a writ of mandamus was issued in the terms craved on the 22nd of August, 1890; but the final determination of the matter was delayed until the hearing of the cause upon its merits. On the 28th of August, Mr. Turcotte ceased to hold the office of Attorney-General, and was succeeded by the Hon. Joseph E. Robidoux, who on the 1st of September became officially a party to the action, and submitted himself to the decision of the Court.

The cause, including the incidental proceedings for mandamus, was heard before Mathieu J., who gave judgment on the 16th of May, 1891. The learned Judge held that the permission originally given to Mr. Walker by the Attorney-General to use his name in the prosecution of the writ could not be

withdrawn without the authority of the Court; and that the discontinuance was not justified and must be rejected. He therefore discharged the writ of mandamus as being unnecessary. The learned judge also held that Blache Lane was shewn by the evidence to have been one of the public streets of the city at the time when it was closed by the company, and that the case came within the provisions of article 997, inasmuch as the company, in closing the lane, had assumed a power which the law did not accord to them. He accordingly condemned the company to reopen the lane within six months from the date of his judgment, and, in the event of their failing to do so, authorized the interveners and Mr. Walker to reopen it at the expense and risk of the company. The learned judge dismissed the interveners' pecuniary claim, on the ground that they had not proved any damage.

The company appealed to the Court of Queen's Bench, who, on the 23rd of December, 1892, reversed the decision of Mathieu J. Before the appeal was heard, Mr. Robidoux had ceased to be Attorney-General, and was succeeded in office by the Hon. T. C. Casgrain, the present appellant, who appears to have entertained a more sanguine view of the merits of his cause, and a more modest estimate of his official privileges, than his predecessor. He was made a party to the record upon a petition which sets forth that he was "desirous to take up the instance in this in his official capacity, and support the judgment in this cause rendered by the Court below, dismissing the discontinuation of the Honourable Arthur Turcotte, and maintaining the original conclusions taken by him to the effect that Blache Lane be ordered to be and be opened with costs."

The Court before whom the appeal was heard consisted of Baby, Bossé, Blanchet, Hall, and Wurtele JJ., who were unanimously of opinion that whether he ought or ought not to permit the action to be continued in his name was a matter entirely within the discretion of the Attorney-General; that the Court had no right to interfere with the exercise of his discretion, and no jurisdiction, in any event, to issue a mandamus against an officer of the Crown in his position. They accordingly held that the discontinuance of the action on the 31st of July, 1890, was

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valid and effectual. Upon the merits, the learned judges were of opinion that it had not been established by satisfactory evidence that Blache Lane was a public street; and they appear, so far as the interveners were concerned, to have attached considerable weight to the fact that they had not only been parties to the closing of the lane, but had been guilty of laches in not objecting until the railway was completed and in operation. They held, in these circumstances, that the case did not fall within article 997 of the code, and they dismissed the original action, the intervention of the city council, and Mr. Walker's writ of mandamus.

The city council have submitted to the judgment of the Court of Queen's Bench, and were therefore not represented in the argument addressed to this Board. In the course of that argument the legality and propriety of their admission to the suit as interveners were fully discussed. Their Lordships entertain doubts whether, in an action brought by the Attorney-General under article 997, any other party can be entitled to appear and prosecute as an intervener in terms of article 154 of the code. Even more doubtful is their right to prosecute a claim of damages which was not within the conclusions of the original writ. But in the absence of the city council, who are out of the case, and seeing that now neither the appellant nor the respondent company have any real interest in its determination, their Lordships abstain from deciding the point. They will proceed to deal with such questions raised in the argument as appear to them to require notice in the order in which they were presented by counsel.

The first of these questions is, whether the information as laid discloses any cause of action under article 997, which enacts as follows: "In the following cases: (1.) Whenever any association or number of persons acts as a corporation without being legally incorporated or recognised; (2.) Whenever any corporation, public body, or board violates any of the provisions of the Acts by which it is governed, or becomes liable to a forfeiture of its rights, or does or omits to do acts the doing or omission of which amounts to a surrender of its corporate rights, privileges and franchises, or exercises any power, franchise or

privilege which does not belong to it or is not conferred upon it by law, it is the duty of Her Majesty's Attorney-General for Lower Canada to prosecute, in Her Majesty's name, such violations of the law whenever he has good reason to believe that such facts can be established by proof, in every case of public general interest, but he is not bound to do so in any other case unless sufficient security is given to indemnify the Government against all costs to be incurred upon such proceeding, and in such case the special information must mention the names of the person who has solicited the Attorney-General to take such legal proceedings, and of the person who has become security for costs."

The respondent company are not alleged to have incurred a forfeiture of their corporate rights, or to have been guilty of any act or omission which implies a surrender of these rights. The charge which the Attorney-General prefers against them is, that in closing Blache Lane, they exercised a power, franchise, or privilege which did not belong to them and was not conferred upon them by law. It therefore becomes necessary to consider what kind of acts are indicated by the statutory expression "exercises any power, franchise, or privilege." Their Lordships are of opinion that the words were meant to include, not every act done by the company which can be shewn to be contrary to law, but such acts only as are either professedly or from their very nature manifestly done in the assertion of some special power, franchise, or privilege. The company might illegally occupy and use a public road and exclude the public in such circumstances as to bring them within the provisions of article 997. On the other hand, if one of their goods trains ran off the line and blocked a highway, and they failed to remove the obstruction within due time, they would be liable to an indictment for nuisance, but could not, in their Lordships' opinion, be reasonably said to have committed the nuisance in the exercise of a power, franchise, or privilege which did not belong to them.

The Attorney-General does not in his information allege that the company closed Blache Lane in the assertion of any power possessed by them to close a public street. On the contrary, he

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avers that they did so under the pretext that they had acquired private interests in the lane which entitled them to shut it up. Neither does he state any fact or circumstance from which it could reasonably be inferred that the company must have seen and known that they were not dealing with private property, but with a public street. The reason for so limiting his averments may very well be explained by the fact that, after a voluminous proof, one judge has come to the conclusion that the lane was a public street, whilst five learned judges are of opinion that the evidence is insufficient to support that conclusion. Their Lordships are of opinion that the averments in the writ, although sufficient to sustain an indictment for nuisance at the instance of the Attorney-General, do not amount to a relevant allegation that the lane was closed by the company, in the exercise of any power, franchise, or privilege, within the meaning of article 997.

Upon the next question, that which relates to the discontinuance of the action, their Lordships entertain no doubt that the decision appealed from is right. The Attorney-General was the sole dominus litis, and had the same right to control the conduct and settlement of the suit as if there had been no relator.

Counsel for the appellant, although they referred to, did not very seriously press, two points which appear to have been relied on in the Courts below. One of these was that a new Attorney-General might so far disturb judicial arrangements made by his predecessor as to retract a discontinuance by the latter; and the other that the Attorney-General for Lower Canada, as an officer of the Crown, stands in this exceptional position, that a mandamus will lie at the instance of his relator to compel him to perform what the Court may conceive to be his official duty in a prosecution under article 997 of the Code. There is no authority for either of these propositions, which are so plainly erroneous that it is unnecessary to take any further notice of them.

But it was strenuously urged on behalf of the appellant that in a prosecution under article 997 the Attorney-General does not possess the usual powers of a plaintiff and dominus litis. In so far as concerns the right to discontinue, it was maintained by the Attorney-General that he is the mere servant of the Court, and cannot refuse to insist until final judgment unless he has

leave from the Court. In support of that strange assertion his counsel relied upon article 998 of the Code, which enacts that, without the authorization of the Court or judge, no writ of summons can issue under article 997. Whatever may be its practical effect, that enactment is plainly intended to be for the protection of the persons or companies against whom the writ is directed. It enables the Court or judge, in their discretion, to prohibit the issue of a writ; but it cannot imply any unusual right on their part to interfere with the discretion of the prosecutor to withdraw or insist after their authority has been given to the institution of his action.

Their Lordships can hardly conceive anything less calculated to advance the interests of justice than to make the Bench prosecutors as well as judges, by devolving upon the Court before whom the cause depends the duty of determining whether the Attorney-General shall or shall not continue to insist. Apart from plain considerations of policy, it is clear that he must always be in a better position than the Court to decide whether he ought or ought not to discontinue the action. Their Lordships have come without difficulty, and certainly without regret, to the conclusion that the learned appellant has underrated his official powers and privileges. With one exception, the authorities cited appeared to them either to have no bearing on the point or to be inconclusive. Sect. 703 of the Revised Statutes of Quebec, 1888, which was not referred to by the appellant's counsel in their opening, and was not noticed in their reply, although cited by the respondents, is, in their Lordships' opinion, conclusive. It enacts that the Attorney-General "has the functions and powers which belong to the office of Attorney-General and Solicitor-General of England respectively, by law or usage, in so far as the same are applicable to this province." It is scarcely necessary to observe that the power to discontinue an action independently of the Court is possessed by the law officers of England, and that no reason exists for holding that an enactment which confers the same power upon the law officer of the Crown for Lower Canada is inapplicable to that province.

Upon the assumption that his predecessor had the power to discontinue, to be exercised according to his own discretion, it

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was argued for the appellant that the discontinuance could not be given effect to, in the first place because it did not comply with the requirements of article 450 of the Civil Procedure Code, and, in the second place, because it was not accepted by the respondent company. It is difficult to say which of the reasons thus alleged was most destitute of plausibility.

Article 450 enables a plaintiff to discontinue his action, and, if he thinks fit, to bring a new case, without the consent, and against the will of the defendant. It is made an indispensable condition that in such a case the plaintiff shall pay the costs incurred by the defendant in the suit which he seeks to discontinue. The article has no application whatever to any case where the parties are agreed as to the terms upon which the suit is to be withdrawn.

But then it was argued that, as matter of fact, the company never accepted or intimated their willingness to accept the discontinuance. The argument is somewhat audacious, seeing that the discontinuance has been all along impeached upon the ground that it was the result of a corrupt agreement between Attorney-General Turcotte and the company to put an end to the action. That they were agreed as to the discontinuance on the terms which it specifies has never been disputed; but corruption was denied, and, although proof was allowed and led upon the point, there is not a tittle of evidence to prove it. And in both Courts below, unsuccessfully in the first, but successfully in the Court of Queen's Bench, the company have pleaded that the discontinuance was valid and terminated the suit.

The greater part of the argument was directed to the merits of the cause, and in particular to the question whether Blache Lane was a public or a private street. Their Lordships do not think it necessary to determine whether the decision of Mathieu J. or the decision of the Court of Queen's Bench upon that point ought to be followed. If the lane was private property, there is admittedly an end of the Attorney-General's case. On the other hand, if the lane was a public street, their Lordships are of opinion that his case equally fails, because the city council had power to authorize, and did authorize, the company to close it.

The plan which has already been referred to was submitted by

the company to the city council, for the purpose of informing that body of the extent to which and the manner in which the construction of their railway would affect the streets of Montreal, and of obtaining their consent to the works indicated on the plan. And it is not disputed that the council, in whom the public streets of the city are vested by statute, was the only authority competent to deal with the application. The evidence clearly proves, and the plan, which speaks for itself, also shews, that the council were distinctly apprised that the design of the company was, not only to close the entrance to Blache Lane from Mountain Street, but to occupy and use the lane for the purpose of constructing their railway track. The council gave their express assent to the carrying out of that design, so that the only question left is, whether they had a legal right to do so. The answer to be given to that question depends upon the construction of sect. 12 of the General Railway Act, c. 109 of the Revised Statutes of Canada, 1888.

The clause, in so far as bearing on this point, enacts that "the railway shall not be carried along an existing highway, but shall merely cross the same in the line of the railway, unless leave has been obtained from the proper municipal or local authority therefor; and no obstruction of such highway with the works shall be made without turning the highway so as to leave an open and good passage for carriages, and, on completion of the works, replacing the highway."

The enactment just quoted appears to their Lordships to deal with two separate matters, the first being the carrying of the permanent track along a public highway, and the second the temporary occupation and obstruction of a highway for the purpose of constructing the permanent works. In the first case the company are empowered to carry their line along a highway, upon condition of their obtaining the consent of the proper authority. In the second case it is imperatively enacted that they shall remove the obstruction and restore the highway to the site which it occupied before their operations commenced as soon as their operations are completed.

If the first branch of these enactments be taken per se, their Lordships see no reason to doubt that it must be interpreted as

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giving the local authority an absolute discretion to sanction the construction of the permanent line of railway along a public road, unqualified by any condition to the effect that the public must not be thereby excluded from the use of the road. The appellant's counsel argued that the discretion conferred upon municipal and local authorities by the first enactment is qualified by the provisions of the second. The result of sustaining that contention would be that the company, as soon as they had with the leave of the proper authority completed the construction of their permanent track upon a public highway, would incur a statutory obligation to remove it and to restore the highway to its original condition.

The clause under consideration, enacted in 1888, was not new legislation. It merely re-enacted, without verbal alteration, sect. 12 of the Canadian statute 14 & 15 Vict. c. 51, and extended to the Dominion the same statutory provisions which had previously been in force within the Provinces of Ontario and Quebec before and after their separation.

In the year 1857, two cases, involving the construction of sect. 12 of the Canadian statute, were decided in the Supreme Court for Upper Canada. The first of these—*Reg.* v. *Grand Trunk Railway Company of Canada* (1)—was an indictment for nuisance against the company, who had in constructing their line occupied for a considerable distance the whole of a public street, to the exclusion of the public, with the leave of the municipality. The prosecutor maintained that the municipality had no power to grant such leave. The judge of First Instance and the learned judges of the Court of Queen's Bench held that under sect. 12 the municipality had power to sanction the closing of a public street; and that their leave having been duly given, no indictment would lie. In the second case—*Re Day and the Town Council of Guelph* (2)—the same question was raised in different circumstances, and was decided in the same way.

Their Lordships cannot assume that the Dominion Legislature, when they adopted the clause verbatim in the year 1888, were in ignorance of the judicial interpretation which it had received. It must, on the contrary, be assumed that they under-

(1) 15 Upper Canada Q. B. 121. (2) 15 Upper Canada Q. B. 126.

stood that sect. 12 of the Canadian Act must have been acted upon in the light of that interpretation. In these circumstances their Lordships, even if they had entertained doubts as to the meaning of sect. 12 of the Act of 1888, would have declined to disturb the construction of its language which had been judicially affirmed.

The practical result of these views is that effect ought to have been given to the discontinuance filed by the Attorney-General in July, 1890; and that the Court of Queen's Bench were right in dismissing the action upon that ground. But the discontinuance was without costs, and it follows that the Court ought not to have given the company the costs incurred by them prior to its date. Their Lordships will therefore humbly advise Her Majesty to affirm the judgment appealed from, with the variation as to costs which they have indicated. The appellant must pay to the respondent company their costs of this appeal.

Solicitors for appellant: *Carr & Martin.*

Solicitors for respondents: *Bompas, Bischoff, Dodgson, Coxe, & Bompas.*

[PRIVY COUNCIL.]

ALEXANDRE AND OTHERS . . . . . PLAINTIFFS;

AND

BRASSARD AND OTHERS . . . . . DEFENDANTS.

J. C.* 1894 *Dec.* 14, 18. 1895 *Feb.* 9.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA, PROVINCE OF QUEBEC.

Law of Lower Canada—Canonical and Civil Jurisdiction as to Creation of Parishes—Jurisdiction of Civil Court—Revised Statutes of Quebec, ss. 3373, 3380.

Held, that under Revised Statutes of Quebec, tit. ix., c. 1, every decree for the canonical erection of a new parish which is valid according to ecclesiastical law is a sufficient foundation for proceedings with the view of obtaining the civil recognition of that parish. No objection thereto can be taken on the ground of antecedent irregularity of procedure.

Proceedings before the Commissioners of the diocese with a view to such

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* *Present*:—THE LORD CHANCELLOR, LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, and LORD SHAND.

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civil recognition are not subject to the review or control of a Court of justice.

An objection to the formation of a new parish, on the ground that one of the old parishes dismembered for that purpose was in debt, is valid under sect. 3380 of Revised Statutes of Quebec; but where the debt relied on was contracted by the Fabrique, it must be proved that the Fabrique was unable to pay it, and that a levy on the Roman Catholic freeholders of the parish has been duly authorized.

APPEAL, by special leave, from a decree of the Court of Queen's Bench (Dec. 23, 1892), affirming a decree of the Superior Court, sitting at St. Jean, district d'Ibberville (June 27, 1892), and dismissing the appellants' suit.

The questions decided in this appeal relate (1.) to the validity of a decree of the Roman Catholic Archbishop of Montreal, dated the 8th of October, 1890, whereby he dismembered a portion of the Roman Catholic parish of St. John the Evangelist in his diocese, and constituted the said portion, together with certain portions of two adjoining parishes, a new parish for ecclesiastical purposes, under the name of St. Blaise; (2.) to the validity of a report, dated the 10th of January, 1891, made by the Commissioners of the diocese, wherein they recommended the Lieutenant-Governor to grant civil recognition of the archbishop's said decree; (3.) to the jurisdiction of the Court of Queen's Bench, Lower Canada, in a civil action brought by some of the parties aggrieved, to inquire into the validity of the said decree and report respectively, and to restrain further proceedings thereon. Both Courts held that they had no such jurisdiction.

The facts and proceedings are stated in the judgment of their Lordships.

Vernon R. Smith, Q.C., and *Taylor*, for the appellants.

Fullarton, Q.C., *Beautier*, Q.C. (of the Canadian Bar), and *Bray*, for the respondents, were not heard.

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The judgment of their Lordships was delivered by

LORD MACNAGHTEN:—

The question in this case relates to the canonical erection and the civil recognition of a new parish in the district of

Ibberville in the province of Quebec, called St. Blaise, which has been formed by the dismemberment of three old parishes, St. Jean l'Evangéliste, St. Marguerite de Blairfindie, and St. Valentin.

The appellants challenge the validity of the proceedings which resulted in the civil recognition of the parish of St. Blaise on two grounds. They allege (1.) that on the occasion of the application to the ecclesiastical authorities for the canonical erection of the parish an essential condition prescribed by law was not observed, and they contend that in consequence of that omission no legal foundation was laid for an application for civil recognition. They also allege (2.) that in the case of the parish of St. Jean l'Evangéliste there existed a debt of the parish which formed a statutory bar to its dismemberment.

It appears that at the date of the cession of Lower Canada the jurisdiction both canonical and civil in reference to the erection and sub-division of parishes was vested in the respective bishops of the diocese, but subject so far as related to civil recognition to the formal assent of the Governor as representing the Crown. After the cession this jurisdiction was recognised by an Ordinance 31 Geo. 3, c. 6. Various statutes were subsequently passed dealing with the matter. The provisions of these statutes are now embodied in Title IX. (Religious Matters), c. 1 of the Revised Statutes of the Province of Quebec.

Chapter 1 is intituled, "Erection and Division of Parishes—Construction and Repair of Churches Parsonages and Cemeteries—and Fabriques." It is divided into sections and sub-sections under which the appropriate articles are arranged.

Sect. I., containing articles 3360–3370, both inclusive, relates to the appointment of Commissioners by the Lieutenant-Governor in each Roman Catholic diocese of the province, and to the general powers of such Commissioners.

Sect. 3366 is in the following terms:—

"All cases respecting either the erection or division of parishes, or the building and repairing of churches, parsonage houses, and cemeteries, and their appurtenances, belonging to Roman Catholics, shall be proceeded with and adjudged upon by the Roman Catholic bishop or person administering the diocese in

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which it is necessary to act, and by the Commissioners appointed for the said diocese."

Sect. II. is headed, "Erection and Division of Parishes." Sub-sect. 1 of sect. 2, headed "Canonical erection of Parishes," contains articles 3371 and 3372.

Article 3371, so far as material to the present question, is as follows:—

"Whenever in any of the following cases it is required:—

"1. To canonically erect any new parish;

"2. To dismember or subdivide any parish;

* * * * * *

"on a petition of a majority of the inhabitants, being freeholders, of the territory designated in such petition interested in the matter, being presented to the Roman Catholic bishop of the diocese . . . . the ecclesiastical authorities, and such other person as they may appoint and authorize for the purposes aforesaid, proceed, according to ecclesiastical law and the practice of the diocese, to the final decree for the canonical erection of any parish, or the division or union of any parishes . . . . as the case may be."

Article 3372 provides for notice to the persons interested before proceeding on the petition.

Sub-sect. 2 of Sect. II., headed, "Civil Erection of Parishes" contains articles 3373–3382, both inclusive. Those articles, so far as material to the first objection on the part of the appellants, are as follows:—

"Article 3373:—Every decree for the canonical erection of a new parish or for the dismemberment or union of any parishes . . . . rendered according to the canonical laws forms and usages followed in the Roman Catholic dioceses in the province, shall to have its effect be publicly read and published on two consecutive Sundays from the pulpit in the churches or chapels of the parishes or missions interested in the said erection dismemberment division . . . . together with a notice informing the persons interested that on the expiration of 30 days, or one day later if the 30th day be a Sunday or a holiday after the last reading and publication of the said Canonical Decree, ten or the majority of the inhabitants being freeholders mentioned in the

petition presented to the ecclesiastical authorities for the rendering of the said Canonical Decree will apply to the Commissioners for the civil recognition thereof, and that all having or pretending to have any opposition or claim to bring against the said civil recognition must file the same before the expiration of the said 30 days with the secretary of the said Commissioners."

"Article 3374:—If within the delay of 30 days no opposition be made to the civil recognition of the Canonical Decree, or if the opposition be dismissed by the Commissioners, the secretary shall transmit the said Canonical Decree to the Lieutenant-Governor, together with a certificate signed by him to the effect that no opposition has been filed with him within the said period, or that having been filed it was dismissed."

"Article 3375:—On receipt of such decree and certificate, the Lieutenant-Governor may without procès-verbal or report from the Commissioners, issue a proclamation under the Great Seal of the province as provided for in article 3381, which proclamation shall have and produce the same effect as a proclamation issued in virtue of a procès-verbal or report of the Commissioners."

Article 3376 deals with the case of an opposition which the Commissioners consider ought to be taken into consideration.

"Article 3381:—On the presentation of the procès-verbal of the Commissioners, containing their report as aforesaid, the Lieutenant-Governor may issue a proclamation under the Great Seal of the Province, erecting such parish for civil purposes, and for confirming establishing and recognising the limits and boundaries thereof; such proclamation shall avail as a legal erection and confirmation, for all civil purposes, of the parish or parishes or sub-divisions of parishes therein designated, and of those which may have been formed by the dismemberment union or sub-division of parishes erected and recognised by the arrêt of His Most Christian Majesty dated 3rd March 1722, or by any other subsequent letters patent or proclamations."

Such being the law applicable to the case, the facts may be stated very briefly:—

In March, 1888, a petition was presented to the Archbishop of

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Montreal, praying him to dismember certain outlying portions of the three parishes and to form them into a separate parish with a view to the convenience of the inhabitants in regard to religious worship and education. After considering the opposition of the present appellants and certain other persons, the archbishop issued a decree granting the prayer of the petition.

The petition on which this decree was made was signed by a majority of the Roman Catholic freeholders of the territory designated in the petition, but not by a majority of Roman Catholic freeholders in each portion of the three parishes forming such territory, or by a majority of the total number of freeholders in the territory, unless Protestant freeholders ought to be excluded from the computation. And, therefore, according to the view of the appellants and the construction which they seek to place upon the enactment, the petition was not in order.

Upon the decree of the archbishop having been obtained, the respondents applied to the Commissioners of the diocese for civil recognition of the new ecclesiastical parish. The appellants, and certain other persons who were co-plaintiffs with them in the action, but who have not appealed, lodged an opposition. They appeared before the Commissioners, called witnesses, and were heard in support of their objections. On the 10th of January, 1891, the Commissioners made a report to the Lieutenant-Governor, in which by a majority they stated that inasmuch as they considered that the decree had been rendered on the petition of the majority of freeholders residing in the territory designated in the petition, that an appeal from the decree to the Pope had been rejected, that all proceedings were regular, and that the oppositions were ill-founded, they rejected the oppositions and recommended that civil recognition should be granted.

The appellants, and the plaintiffs who have not appealed, applied to the Court of Queen's Bench for a writ of certiorari to quash the report. The application was refused. They then raised the present action, asking in effect for a declaration that the proceedings to which they objected were invalid, and claiming an injunction and damages. The action came on for hearing in the Superior Court before Tellier J. On the 27th of

June, 1892, that learned judge gave judgment dismissing the action with costs, upon the ground that the Court had no jurisdiction to review the archbishop's decree or the report of the Commissioners, or to arrest the action of the Lieutenant-Governor.

In September, 1892, civil recognition was accorded to the parish of St. Blaise by a proclamation under the Great Seal of the Province.

On appeal to the Court of Queen's Bench the judgment of the Superior Court was affirmed on the 23rd of December, 1893, by Lacoste C.J., Baby, Bossé, and Wurtele JJ., Hall J. dissenting.

Notwithstanding the able arguments on behalf of the appellants, their Lordships are of opinion that the judgment of the Court of Queen's Bench affirming the decision of Tellier J. is correct.

It was not disputed at the Bar that the decree of the archbishop was a good and valid decree for all ecclesiastical purposes, and that the parish of St. Blaise has been canonically erected. The argument on behalf of the appellants was that the ecclesiastical authorities were not properly put in motion, and that although it was not competent for the Court to set aside the canonical decree, the Court was at liberty to inquire into the proceedings which gave rise to it, and they contended that if those proceedings were found not in accordance with the provisions of the law, the decree could not be treated as a decree available for the purpose of founding civil recognition.

Their Lordships cannot take this view. It appears to them that the provision in question is not a limitation on the jurisdiction of the ecclesiastical authorities, or a condition precedent to the validity of all subsequent proceedings. It is rather in the nature of a rule of procedure, and in their Lordships' opinion it is for the ecclesiastical authorities and for them alone to decide as to the validity of any objection founded on alleged non-compliance with it.

In connection with this point it will not be out of place to observe that the articles relating to the civil erection of parishes form the subject of a separate and distinct sub-section. The first article in that sub-section in its opening words speaks of "Every

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decree for the canonical erection of a new parish." The words are general. There is nothing referring them back to what has gone before, or confining the case to a decree made in the manner prescribed by the preceding sub-section. It seems to their Lordships, therefore, that according to the grammatical construction of the language of this sub-section, as well as according to the good sense of the matter, every decree for the canonical erection of a new parish which is valid according to ecclesiastical law is a sufficient foundation for proceedings with the view of obtaining civil recognition. Otherwise a canonical decree, valid according to ecclesiastical law, but having the defect or flaw which the appellants attribute to the archbishop's decree in this case, would for all time be a bar to civil recognition. For there are no means of curing this defect or getting rid of the difficulty.

Their Lordships have dealt with this matter because it is of general interest, and it formed the principal subject of the arguments addressed to them. At the same time they desire to say that they see no reason to differ from the conclusion of the learned judges of the Court of Queen's Bench, who have held that proceedings before the Commissioners, in accordance with the statutory provisions relating thereto, with a view to the civil recognition of a new parish are not subject to the review or control of a Court of justice. The functions of the Commissioners in this respect are simply to inquire and report to the executive Government, and although they are empowered to dismiss an opposition made to the civil recognition of a canonical decree, they are required to report the dismissal to the Lieutenant-Governor when they transmit the canonical decree to him. Persons who may consider themselves aggrieved by the dismissal of their opposition are not without remedy. But their remedy is not to be sought in a Court of law. It appears from the judgment of Wurtele J., as well as from Baudry J.'s Treatise (p. 51), that it is the practice for the executive Government before granting civil recognition to listen to all remonstrances and objections properly brought before them. "In all such cases," says Wurtele J., "the parties are always heard, and the circumstances are carefully considered before any action is taken." . . . "It is within my own knowledge," he adds, "that on several

occasions after having considered the objections made to the civil erection, the Lieutenant-Governor, on the advice of the Executive Council, has declined to issue the proclamation and to give civil effect to a Canonical Decree."

The objection founded on the alleged debt of the Parish of St. Jean l'Evangéliste is a more serious objection in a legal point of view. For article 3380 provides that nothing in the chapter shall extend to any parish which has contracted debts for the erection of churches or parsonage houses therein until the said debts are paid and satisfied. In the present case, however, the alleged debt is not a debt of the parish. It was not contracted by the parish. It was contracted by the Fabrique, and the Fabrique apparently has sufficient means to discharge the debt, or so much of it as remains unpaid, by the stipulated instalments, without throwing any part of it upon the parish. A debt of the Fabrique may no doubt become a debt of the parish. But to bring about that result two things must concur. In the first place the Fabrique must ascertain the impossibility of paying the debt by means of the revenues at its disposal; and in the next place it must obtain an authorization for a levy upon the Roman Catholic freeholders of the parish at a meeting of the parish regularly called.

For these reasons their Lordships are of opinion that the appeal wholly fails, and they will humbly advise Her Majesty that it ought to be dismissed.

The appellants will pay the costs of the appeal.

Solicitors for the appellants: *Bircham & Co.*

Solicitors for the respondents: *Bompas, Bischoff, Dodgson, Coxe, & Bompas.*

[PRIVY COUNCIL.]

J. C.* 1894 July 6, 10, 11; 1895 Feb. 9.

AITKEN AND ANOTHER . . . . . DEFENDANTS;

AND

McMECKAN . . . . . PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Verdict against Weight of Evidence—New Trial ordered—Issue as to Testator's Capacity.

In a suit to revoke probate of a will the jury found by a majority that the testator was of unsound mind at the date of its execution:—

Held, reversing an order of the Full Court, that the verdict must be set aside as against the weight of evidence; the medical evidence being insufficient to support it, while the other evidence of incapacity related to irrelevant circumstances, and was contradicted by witnesses who deposed to actual transactions with the testator, and to his conduct and condition at the time of executing his will.

APPEAL from an order of the Supreme Court (March 8, 1892) dismissing a motion for a new trial.

The facts are stated in the judgment of their Lordships. The Full Court, in dismissing the motion, after fully discussing the evidence in favour of the will, remarked that "the value of it must greatly depend upon the character of the witnesses who gave it, upon their powers of observation, upon their tendency to exaggerate or to speak accurately, points upon which the jury were in a better position to form a judgment than we can possibly be. We have not to determine that we should ourselves have come to the same conclusion as the majority of the jury; but before upsetting their verdict, we should be sure that, as reasonable men, they ought not to have arrived at it. Looking at the strong evidence for and against the will, and the points of contradiction between witnesses who are in conflict, we cannot say that the jury were bound to find in favour of testamentary capacity."

* *Present*:—LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, and SIR RICHARD COUCH.

Finlay, Q.C., and *Deane*, for the appellant.

Sir *R. Webster*, Q.C., *Mansfield*, and *Herald* (of the Victorian Bar), for the respondent.

The judgment of their Lordships was delivered by

LORD MORRIS:—

Captain James McMeckan died on the 23rd of May, 1890, and on the 12th of June of the same year probate was granted of his will, which bears date the 1st of June, 1888. On the 2nd of March, 1891, the plaintiff, John Jackson Addison McMeckan, the nephew of the deceased testator and the respondent in this appeal, filed a statement of claim wherein he alleged that prior to and at the time of executing the said will the said James McMeckan was not of testamentary capacity, and was of unsound mind, and incapable of executing any testamentary document, and he further alleged that the execution of the will was procured by the undue influence of Grace Mackie, the niece of the said James McMeckan, and he consequently sought for a declaration to that effect and claimed a revocation of the probate of the will. The defendants, James Aitken and George Martin, who are the executors of the will, and the appellants in this appeal, traversed these allegations in the statement of claim, and the plaintiff joined issue on the traverses. The action was tried before the Chief Justice and a special jury at Melbourne. At the trial the learned Chief Justice handed to the jury two written questions: 1st, "Was the execution of the will, dated June 1st, 1888, procured by the undue influence of Miss Grace Mackie?" Upon that question he held that there was no evidence to sustain the plaintiff's allegation, and directed a verdict for the defendants, to which direction no exception has been or is taken. The 2nd question was as follows: "Was Captain James McMeckan, prior to and at the time of executing the will dated June 1, 1888, of unsound mind and incapable of executing any testamentary document?" The jury by a three-fourths majority found in the affirmative to this question, and on the 19th of August, 1891, judgment was given for the plaintiff, ordering that the probate of the will should be revoked. The defendants moved

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the Full Court for a new trial, on the ground that the finding of the jury was against the weight of evidence; but the Full Court, by an order of the 8th of March, 1892, dismissed the motion. The case now comes on appeal from that order to Her Majesty in Council.

The testator, Captain James McMeckan lived at Hawthorn, near Melbourne, and had been for many years a partner in a firm of shipowners there. He was unmarried and had living at the time of his death three sets of nephews and nieces, viz., 1st group: Grace, Helen, William, and Anthony Mackie, the surviving children of his deceased sister Grace Mackie; 2nd group: five surviving children of his deceased sister Nancy Kerr; and 3rd group: James McMeckan and John McMeckan (the plaintiff), the surviving sons of his late brother Anthony McMeckan. His brothers and sisters all pre-deceased him. The Mackie family had resided with the testator for many years. Grace Mackie had done so permanently from the year 1868, and she managed his household. The plaintiff had been always on friendly terms with his uncle the testator and often visited him. The Kerrs resided altogether in Scotland.

The testator was clearly proved to have been before and up to the 9th of March, 1888, a shrewd man of business, self-reliant, and decided in character, and was described as a hard-headed Scotchman. That he was a successful man is proved by the fact that he died possessed of property valued at over £120,000. In January, 1870, he gave instructions for his will to a solicitor, Mr. Klingender. At that period his property amounted in value to about £20,000. By this will he left to his brother John McMeckan, £800, to his sister Nancy Kerr £1000, to each of her six children £800, to his sister-in-law Kate McMeckan, widow of his brother Anthony, £800, to each of their three children £1000, to William Mackie £800, to Hugh Mackie £800, to Grace Mackie £1000, to Anthony Mackie £800, to Grace and Agnes Hamilton, daughters of his sister Margaret Hamilton, £800 each, to his nephew George McMeckan £800, and to each of his two executors £300, these legacies amounting in the whole to about £17,000. Mr. Klingender called his attention to the fact that he had given no instructions as to the disposal

of the residue of his property, after the payment of the legacies. He said there would be no residue, but that if there was anything it was to be divided equally among the relatives named in the will. The will was drawn by Mr. Klingender in accordance with these instructions, and was executed by the testator on the 24th of February, 1870. He executed a codicil on the 25th of October, 1875, merely altering his executors in consequence of the death of one of them. He executed a further codicil on the 19th of February, 1877, whereby he revoked the bequest to his sister-in-law, Kate McMeckan, she having re-married out of the family; and he also revoked the bequest of £1000 to his nephew James McMeckan, who had incurred his displeasure.

On the 9th of March, 1888, the testator, while lunching at his club in Melbourne, had a seizure. He was conveyed home in a cab by a waiter about four o'clock in the afternoon, went to his bed, and was visited by his ordinary medical attendant, Dr. Flett, about six o'clock.

The making of the will of the 1st of June, 1888, was brought about in the following way. Some six weeks or two months after the 9th of March, 1888, Mr. James Aitken, the testator's agent and banker and his partner in station business, and one of the executors of the will in dispute, was visiting him, and he introduced the subject of a will by asking the testator whether he had settled his affairs, to which the testator replied that he had a will, and he went out of the room and brought back with him the will of 1870, and handed it to Mr. Aitken to look at. Mr. Aitken said to him that things had changed very much with him since 1870, and that he had better let him send out Mr. Klingender to have the will overhauled. The testator did not on that occasion assent, but he did so on a subsequent visit, and on the 14th of May Mr. Aitken called at Mr. Klingender's office, who on the 16th of May visited the testator at his house. Mr. Klingender stated in his evidence that he saw the testator in a room called the library; that he was sitting on a chair with a newspaper before him; that he said he wanted to see him (Mr. Klingender) about his will, that a great number of the people named in the former will had died, and that things had changed very much since the old will was made; that he (Mr. Klingender)

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produced the instructions for the will of 1870, which he had preserved and brought with him, and proceeded to read over the names of the persons in the will, saying to the testator:—"You will tell me which of them are dead." The witness gave in detail the answers of the testator as to each of the names so read out, and then asked the testator:—"What is your will to be?" to which the testator replied: "The same as the old one," and that he would leave a legacy of £500 to the "Ladies Benevolent Society." The witness then asked what was to become of the residue, and the testator said it was to be divided among the Mackie family. Mr. Klingender said that he prepared a draft new will by altering the draft of the will of 1870 in red ink, and brought it on the 26th of May, 1888, to the testator to whom he read it; that when he got to the foot of the first page, where the legacy was given to his nephew James McMeckan, the testator said: "Take him out; he shall never have a farthing of my money"; that when he read the clause referring to his nephew George McMeckan the testator said: "Strike that out; he is already well provided for"; that the testator made an alteration in his nomination of executors, and directed the insertion of a legacy to the "Scots' Church Children's Aid Society." Mr. Klingender went on to say, that on the 1st of June he attended at the testator's house with the new will engrossed, taking with him his book-keeper who witnessed its formal execution; that it was duly executed; and that at the same time the testator cut or tore off his signatures to the will of 1870 and the two codicils.

On the question whether the testator was prior to and at the time of executing the will of the 1st of June, 1888, of unsound mind and incapable of executing any testamentary document, the plaintiff relied upon two classes of evidence: First, evidence that the testator was at the time suffering from brain disease which so affected his mind as to render him incapable of executing any testamentary instrument. Secondly, the evidence of witnesses as to their own observation of the testator and the state of his mind. The defendants controverted both classes of evidence. They alleged that the disease which the testator suffered from arose from his heart and did not affect his mind, and they produced a number of witnesses who had not only

formed an opinion of his business capacity, but who had transacted business with him; and they relied especially upon the evidence of Mr. Aitken and of Mr. Klingender as to the making of the will itself.

A very considerable portion of the evidence in the case was addressed to the nature of the seizure that the testator had at the club on the 9th of March, whether it was apoplexy arising from affection of the brain, or a fainting fit from affection of the heart. An undue amount of importance was given to this contention, and to the skill, accuracy, and credit of Doctors Jackson and Flett, who respectively supported these rival theories. Whether it was cerebral affection or heart affection from which the testator suffered becomes of importance only to the extent that if it was the former the testator would be more unlikely to be capable of understanding business than if the attack arose from the latter cause; and it is probable that the jury were unduly impressed as to the capacity of the testator on the 1st of June, 1888, by the conclusions they formed as to the accuracy and credit of Dr. Jackson or of Dr. Flett. Assuming that the seizure was of the character of cerebral affection, the question still remains, had the attack so affected the testator as to render him incapable of transacting important business? From the time of the seizure he undoubtedly became an altered man. It caused an entire change in his mode of life. He did not leave his home. He wrote no letters. He made no entries of his expenses as he had previously done. He did not fill up his cheques, though he signed them. He became a shattered man. But to what extent? The evidence for the plaintiff, apart from the medical evidence, is the evidence of witnesses who speak to the condition of the testator as he appeared to them, and who state that in their opinion he was not fit to transact business, but it is important to notice that none of them appears to have tried him on business subjects; on the other hand, several of the witnesses for the defendants speak not only to their opinions as to his capacity, but also to conversations with him on business subjects, and to the actual transaction of business with him. There appears to be no cause for doubting the truth of the evidence of Mr. James Aitken, which most strongly points to the capacity of the testator.

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Mr. Aitken was the managing director of the firm of Dalgetty & Co. He had known the testator for twenty-five years—"more intimately," he said, "since 1879, 1880." He was his agent and banker. The testator visited him once or twice a week in his office up to the date of the seizure, and after that the witness used to visit the testator at his house, bringing with him the accounts of the expenditure on the stations. He was at the club at lunch on the very day the testator got the seizure, and saw him immediately after it and before he was removed home. He visited him a day or two after it, and continued to do so, bringing business papers with him which the testator went over. But the most important of all the witnesses on this point is Mr. Klingender, who went to see the testator on the 16th of May. His evidence, which has been referred to by their Lordships, and which is fully set forth in the learned Chief Justice's charge to the jury, is entirely inconsistent with an unsoundness of mind such as would render the testator incapable of making any testamentary disposition.

Their Lordships are not unmindful of the weight due to the verdict of the jury, which should not be set aside merely because the judge is of opinion that if he were the jury he would have found the other way. Still it is by no means an immaterial circumstance that the learned Chief Justice who tried the case stated that he was not satisfied with the verdict, and that in his opinion it was wrong. Further, their Lordships cannot regard the conflict in this case as one in which evidence on the one side is to be weighed against evidence of the same quality on the other. As the learned Chief Justice pointed out in his charge to the jury, and as their Lordships have already observed, the witnesses who spoke to occasions of incapacity were not transacting business with the testator, whereas those who did transact business with him were satisfied of his capacity. The two classes of evidence run on different planes. That of the defendants applies itself to the crucial period of the making of the will, while that of the plaintiff is addressed to the testator's conduct and condition at other times. The disproportionate amount of attention given to the medical evidence, which as above observed bears rather on the probable capacity of the testator than on his

actual capacity as exhibited in action, was calculated to divert the attention of the jury from the real issue. On these grounds their Lordships hold that the verdict is contrary to the evidence to such an extent as to call for a new trial. It was urged at the Bar that even if the testator were of capacity to make a will, he may not have understood the amount of his estate or the effect of the residuary gift. No such question was raised by the pleadings, nor was there any cross-examination of Mr. Klingender or Mr. Aitken in respect to it, nor was any evidence directed to the point, nor was any such question put to the jury. But as there will be a new trial, the plaintiff can present his case in any way that the evidence at his command admits of.

Their Lordships are therefore of opinion that the judgment of the Supreme Court of the 19th of August, 1891, except in so far as it relates to costs, and the order of the Full Court of the 8th of March, 1892, should be set aside, and that a new trial should be granted, and that the costs of both parties in the Full Court should be paid out of the estate of the said James McMeckan in the same manner as is directed by the said judgment of the 19th of August, 1891, and their Lordships will so humbly advise Her Majesty. The costs of this appeal must be dealt with in the same manner.

Solicitors for the appellants: *St. Barbe Sladen & Wing.*
Solicitors for the respondent: *Wadeson & Malleson.*

[PRIVY COUNCIL.]

J. C.* 1895 Jan. 23, 24; March 30.

FORGET . . . . . PLAINTIFF;

AND

OSTIGNY . . . . . DEFENDANT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA, PROVINCE OF QUEBEC.

Civil Code, Art. 1927—8 & 9 *Vict. c.* 109—*Alleged Gambling Transactions—Principal and Broker—Practice—Costs.*

Art. 1927 of the Civil Code does not differ substantially from 8 & 9 Vict. c. 109, s. 18, and renders null and void all contracts by way of gaming and wagering.

A broker was employed to make actual contracts of purchase and sale, in each case completed by delivery and payment, on behalf of a principal whose object was not investment but speculation:—

Held, that these were not gaming contracts within the meaning of the Code.

Costs of both parties directed to be paid by the successful appellant, special leave having been given to him under special circumstances notwithstanding the small amount at stake.

APPEAL from a decree of the Court of Queen's Bench (Sept. 27, 1893) affirming a decree of the Superior Court of Montreal (Dec. 19, 1891).

The facts are stated in the judgment of their Lordships.

The Superior Court regarded the issue as being whether the appellant was seeking to recover money claimed under a gaming contract; and decided it in the affirmative. It found as facts (1.) that the respondent had never had the intention of taking delivery, but merely to speculate on the rise and to settle according to the variation of prices; (2.) that the appellant could not have been ignorant of the circumstances of the respondent, and that he encouraged the speculations of the respondent by not fixing any date for the delivery of the shares; (3.) that each transaction between the appellant and the respondent was nothing else but a bet upon the rise of the shares in question,

* *Present*:—THE LORD CHANCELLOR, LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, LORD SHAND, LORD DAVEY, and SIR RICHARD COUCH.

the appellant undertaking to pay to the respondent the difference of prices if they rose, and the respondent undertaking to pay to the appellant the difference of prices if they fell; (4.) that under these circumstances the purchase of shares by the appellant had no other effect than to shield himself against the rise of price expected by the respondent.

The Court of Queen's Bench (dissentiente Hall J.) affirmed this decision. It held that the respondent was bound to prove that the money claimed by the appellant was exigible under a gaming contract or a bet; and further, that the Superior Court had not incorrectly appreciated the evidence.

Fullarton, Q.C., and *English Harrison*, for the appellant, contended that he was entitled to the full amount claimed. They referred to art. 1927 of the Civil Code; to 8 & 9 Vict. c. 109, and to the Dominion Act (51 Vict. c. 42), which was passed after the date of the transactions in this case. They contended that the evidence shewed that actual purchases and sales of shares were in every case effected by the appellant pursuant to the respondent's instructions; that there was actual transfer or delivery of shares bought or sold in every case; that the appellant did not gain nor stand to gain anything, and did not lose nor stand to lose anything, by the rise or fall in the price of the shares. The appellant in fact charged a fixed commission, and there was no evidence that his transactions with the respondent were by way of gaming and wagering. The evidence precluded that view, and even as between the appellant and third parties the transactions were real. Reference was made to *Thacker* v. *Hardy* (1); *Carlill* v. *Carbolic Smoke Ball Company* (2); *Bridger* v. *Savage* (3); *Read* v. *Anderson* (4).

Alexander Young, for the respondent, contended that the judgments below were right. The effect of the evidence was to discharge the respondent of the onus imposed upon him of shewing that the transactions were gaming contracts or bets. An action brought to recover money claimed thereunder was precluded by

(1) 4 Q. B. D. 685.
(2) [1892] 2 Q. B. 484, 491.
(3) 15 Q. B. D. 363.
(4) 13 Q. B. D. 779.

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art. 1927 of the Civil Code of Lower Canada. Further, the appellant's claim, if not forbidden by art. 1927, was barred by prescription, all the transactions, except one in 1886, having taken place more than five years before action brought. The effect of the transaction in 1886 was not to interrupt prescription, having regard to art. 2227. It did not amount to a renunciation of the benefit of lapse of time or to an acknowledgment of the plaintiff's right within the meaning of that article.

Fullarton, Q.C., replied.

1895 *March* 30.

The judgment of their Lordships was delivered by

THE LORD CHANCELLOR:—

The appellant is a member of the Montreal Stock Exchange. The action which has given rise to this appeal was brought to recover a sum of $1926. 87, the balance alleged to be due from the respondent in respect of certain contracts entered into by the appellant on his behalf and by his directions for the purchase and sale of shares in various joint stock companies. The respondent pleaded, first, that the claim was prescribed by lapse of time; and, secondly, that the transactions which gave rise to it were gambling transactions on the rise and fall of shares, and that therefore the action could not be maintained.

In view of this latter defence it is necessary to state the facts with some particularity. The transactions between the parties commenced with the purchase by the appellant in December, 1882, of twenty-five shares of the Montreal Street Railway Company. Additional shares were subsequently purchased in the same undertaking. Purchases were also made of the shares of other companies. The price paid for the shares purchased was debited to the respondent by the appellant with $\frac{1}{4}$ per cent. commission added. The shares so purchased were sold from time to time, and the proceeds were credited to the respondent less a commission of $\frac{1}{4}$ per cent.

It is not in dispute that all these transactions were entered into at the instance and on behalf of the respondent. When a purchase of shares was to be made he furnished the appellant

with a small portion of the purchase-money which would be required: thus in the case of the first transaction to which allusion has been made he paid $62. 50. In every case delivery of the shares was obtained by the appellant from the member of the Stock Exchange from whom he purchased, and the shares were duly paid for. The money necessary for this purpose beyond that supplied by the respondent was raised by the appellant by means of loans from a bank, the shares serving as security. The loans needed for the respondent's transactions were not always raised specifically upon the shares purchased for him. The appellant acted as broker for many clients, and the advances which were required for the purpose of completing contracts entered into on their behalf were raised by hypothecating to a bank their several securities and obtaining the advance of a lump sum.

When the shares purchased for the respondent were sold they were redeemed from the bank and delivered to the purchaser. In respect of the advances obtained from the bank, the appellant charged the respondent 1 per cent. more than the interest for which he had made himself liable to the bank. If between the time of the purchase and that of the sale of particular shares dividends were paid upon them, these dividends were credited to the respondent.

It should be added, as reliance is placed upon the fact, that the respondent was a bank clerk with a salary of $900 to $1000 a year.

It is conceded that the only law prevailing in Canada upon which the respondent can rely for the purpose of establishing that the appellant is not entitled to recover the sum claimed is art. 1927 of the Civil Code of Lower Canada. It is in these terms:—

"There is no right of action for the recovery of money or any other thing claimed under a gaming contract or a bet." (1)

In order, therefore, to sustain his defence it was incumbent on the respondent to shew that the money sought to be recovered was claimed under a gaming contract or a bet. The learned

(1) The language of this Title appears to be founded on that of the Code Napoléon, artt. 1965-1967.—F.P.

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judge who tried the case, and, on appeal, the Court of Queen's Bench for Lower Canada (Hall J. dissenting), thought he had made this out—hence the present appeal.

The defence turning upon the question whether the claim is founded upon a gaming contract, it is essential to ascertain the exact nature of the obligation relied on by the appellant. Unless there was a gaming contract between the parties to this action, so that the appellant, in order to make good his claim must rely on such a contract, the defence obviously fails.

What, then, was the nature of the contract between these parties?

The appellant was employed by the respondent as his mandatory or agent to make certain contracts of purchase and sale on his behalf. The contracts made, which were unquestionably within the authority given by the respondent, were certainly not gaming contracts as between the parties to them. They were real transactions: the shares purchased and sold were in every case delivered, and the price of them paid or received, as the case might be. All this is not in dispute. The appellant having entered into these contracts as agent for the respondent, the latter was primâ facie bound to indemnify the former against any liability incurred in respect of them. He was, on the other hand, exclusively entitled to the benefit of them. If the shares purchased increased in value the result was a gain to the respondent and did not involve any loss to the appellant. If, on the other hand, the shares decreased in value, while the respondent sustained a loss no gain resulted to the appellant. In neither contingency, therefore, did the respondent's gain involve a loss to the appellant. His remuneration was in any event a fixed commission of $\frac{1}{4}$ per cent. It would be, of course, an abuse of language to apply the term "bet" to such a transaction. Their Lordships cannot think that it is any more legitimate to speak of it as a gaming contract between the appellant and the respondent.

In the Courts below much stress was laid on the fact that the respondent was known to the appellant to be a bank clerk with a small salary and possessed of little other means. This was regarded as bringing home to him the knowledge that the

respondent had in view not investment but gambling. The other circumstances mainly relied on were that the respondent never asked for nor received delivery of any of the shares purchased; that the purchase-money was raised by a loan procured by the appellant; that the respondent was not in a position to furnish the whole of the purchase-money, and, in fact, only provided the appellant with a small margin.

It may well be that the appellant was aware that in directing a purchase to be made the respondent did not intend to keep the shares purchased, but to sell them when, as he anticipated would be the case, they rose in value; that his object was not investment but speculation. To enter into such transactions with such an object is sometimes spoken of as "gambling on the Stock Exchange"; but it certainly does not follow that the transactions involve any gaming contract. A contract cannot properly be so described merely because it is entered into in furtherance of a speculation. It is a legitimate commercial transaction to buy a commodity in the expectation that it will rise in value and with the intention of realizing a profit by its resale. Such dealings are of every-day occurrence in commerce. The legal aspect of the case is the same whatever be the nature of the commodity, whether it be a cargo of wheat or the shares of a joint-stock company. Nor, again, do such purchases and sales become gaming contracts because the person purchasing is not possessed of the money required to pay for his purchases, but obtains the requisite funds in a large measure by means of advances on the security of the stocks or goods he has purchased. This, also, is an every-day commercial transaction. For example, a merchant who has to pay the price of a cargo purchased before he resells it obtains in ordinary course the means of doing so by pledging the bill of lading.

Much stress was laid on the fact that the respondent never asked for delivery of any of the shares purchased, and that the appellant never tendered such delivery. The question whether a contract is intended to be executed by delivery according to the obligations expressed upon the face of it is no doubt an important test for determining whether it is a real one or only a gambling arrangement under the guise of a commercial contract.

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In the Act passed by the Dominion Parliament in 1888 (51 Vict. c. 42) with a view of putting down what were then known as "bucket shops," it is provided (sect. 1) that: "Every one who . . . . with the intent to make gain or profit by the rise or fall in price of any stock of any incorporated or unincorporated company or undertaking, ... or of any goods, wares or merchandise makes . . . any contract or agreement, oral or written, purporting to be for the sale or purchase of any such shares of stock, goods, wares or merchandise, in respect of which no delivery of the thing sold or purchased is made or received, and without the bonâ fide intention to make or receive such delivery; and every one who acts, aids or abets in the making or signing of any such contract or agreement is guilty of a misdemeanour."

A proviso was, however, added in the following terms: "but the foregoing provisions shall not apply to cases where the broker of the purchaser receives delivery, on his behalf, of the article sold, notwithstanding that such broker retains or pledges the same as security for the advance of the purchase-money or any part thereof."

Their Lordships think this proviso was enacted by way of precaution only, inasmuch as they cannot doubt that, where a real contract of purchase has been made and carried out by a broker on behalf of a principal, delivery to the broker is delivery to the principal just as much as if it had been actually made to himself.

In the present case, the respondent might at any time on tendering the balance due in respect of any of the shares purchased have required the appellant to deliver them to him. As has been pointed out, he received the dividends upon them, and any increase in their value enured exclusively for his benefit, whilst if there were a diminution of value the loss was exclusively his.

It is unnecessary to inquire whether, in pledging the securities of his clients for a lump sum to raise the moneys which he was authorized by them to raise instead of obtaining separate loans on their several securities, the appellant was acting within the authority conferred upon him, for it does not seem to their Lordships to have a material bearing upon the question whether the contract sued on was a gaming one.

The decisions in the English Courts are of course not authorities upon the construction of the article of the Canadian Code. But the words of the English statute relating to gambling contracts (8 & 9 Vict. c. 109) do not differ substantially from those found in the Code. That statute renders null and void all contracts by way of gaming and wagering. The English authorities may, therefore, well be referred to as throwing light on the question what constitutes a gaming contract.

The case of *Thacker* v. *Hardy* (1), in the Court of Appeal in England, was very similar to that under consideration. The plaintiff was a broker who purchased and sold stocks and shares on the Stock Exchange for the defendant by his authority. He sued the defendant for commission and for an indemnity in respect of certain contracts into which he had entered pursuant to the defendant's instructions. The defence was founded upon 8 & 9 Vict. c. 109, s. 18.

Lindley J. held, and his judgment was affirmed by the Court of Appeal, that the plaintiff was entitled to recover.

Bramwell L.J. said: "The bargains made by the plaintiff upon behalf of the defendant were what they purported to be; they gave the jobber a right to call upon the broker or the principal to take the stock, and they gave the broker the right to call upon the jobber to deliver it" (2).

He further said: "I will assume that that was the nature of the bargain between the parties, and that by its terms the principal would be entitled to call on the broker to resell the stock, so that, instead of taking and paying for it, the principal would have to pay only the differences. In my opinion that bargain does not infringe the provisions of 8 & 9 Vict. c. 109, which was directed against gaming and wagering; for the principal might take the stock which has been bought for him, and hold it as an investment" (3).

He points out, too, that there is no gaming and wagering in a transaction of the kind now in question. The passage is as follows: "The broker has no interest in the stock, and it does not matter to him whether the market rises or falls; but when a transaction comes within the statute against gaming and

(1) 4 Q. B. D. 685. (2) 4 Q. B. D. at p. 690. (3) 4 Q. B. D. at p. 691.

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wagering, the result of it does affect both parties. In the case before us, the broker does not wager at all."

Cotton L.J. laid down what in his view was of the essence of a gaming contract in these terms: "The essence of gaming and wagering is that one party is to win and the other to lose upon a future event, which at the time of the contract is of an uncertain nature—that is to say, if the event turns out one way, A. will lose, but if it turns out the other way he will win. But that is not the state of facts here. The plaintiff was to derive no gain from the transaction; his gain consisted in the commission which he was to receive, whatever might be the result of the transaction to the defendant. Therefore the whole element of gaming and wagering was absent from the contract entered into between the parties" (1).

Even where a person is employed to enter into gambling contracts upon commission, it has been held by the Courts of this country that, if he makes payments in pursuance of such employment, he can recover such payments from his principal, that the implied contract of indemnity is not, in such a case, in itself a gaming or wagering contract, and is therefore not null and void. The intervention of the legislature was considered necessary in order to invalidate such contracts, and by the Gaming Act, 1892, any promise, express or implied, to pay any person any sum of money paid by him in respect of a contract rendered null and void by 8 & 9 Vict. c. 109, or to pay any sum by way of commission or reward for any services in relation thereto, is rendered null and void.

With regard to the plea of prescription, the facts stand thus. After the transactions which gave rise to the debit balance against the respondent were closed, he, in October, 1885, sent to the appellant $100 as margin for the purchase of ten shares in the Bank of Montreal. He received notice in February, 1886, that these shares had been sold at a profit of $150, and he acquiesced in this sum as well as the $100 which he had sent in the previous October being placed to the credit of his general account. The learned judge who tried the case came to the conclusion that under these circumstances the plea of prescrip-

(1) 4 Q. B. D. at p. 695.

tion could not prevail. This view was concurred in by the Court of Queen's Bench, and their Lordships see no reason to differ from the decision thus arrived at.

For the reasons which have been given, their Lordships think that the judgments of the Courts below ought to be reversed, and that judgment should be entered for the appellant for the sum claimed, with costs in both the Courts below.

As regards the costs of this appeal, inasmuch as the appellant was allowed to prosecute it, notwithstanding the small amount at stake, upon the ground that it involved a question of wide general interest, especially to those following the appellant's calling, their Lordships think that the appellant should, under the peculiar circumstances, bear the costs of the appeal on both sides.

They will humbly advise Her Majesty in accordance with the opinion they have expressed.

Solicitors for appellant: *Budd, Johnsons & Jecks.*
Solicitors for respondent: *Simpson & Co.*

[HOUSE OF LORDS.]

H. L. (Sc.) 1895 April 8.

METCALFE AND OTHERS . . . . . APPELLANTS;

AND

COX AND OTHERS . . . . . RESPONDENTS.

University—Affiliation—University of St. Andrews and University College of Dundee—"Ordinance"—Approval by Parliament—The Universities (Scotland) Act, 1889 (52 & 53 *Vict. c.* 55), *ss.* 15, 16, 19, 20.

The Universities (Scotland) Act, 1889, appointed a temporary commission charged with the duty of making provision for improving the administration of the Scottish universities and extending their usefulness. By sect. 15 the Commissioners might, if they thought fit, make ordinances to extend any of the universities by affiliating new colleges to them subject to certain prescribed conditions. By sect. 16, "without prejudice to any of the powers hereinbefore conferred, the Commissioners shall with respect to the University of St. Andrews and the University College of Dundee have power (1) to affiliate the said university college to and make it form part of the said university with the consent of the University Court of St. Andrews and also of the said college with the object, inter alia, of establishing a fully equipped conjoint university school of medicine. . . . ." Sect. 19 contained provisions as to the preparation and publication by the Commissioners of ordinances relating to any university. By sect. 20, all ordinances made by the Commissioners are to be published in the *Edinburgh Gazette*, laid before parliament, and submitted to the Queen in Council for approval, and "no such ordinance shall be effectual until it shall have been so published, laid before parliament, and approved by Her Majesty in Council."

The Commissioners, assuming to act under the powers of sect. 16, executed an instrument in writing by which they declared that they had affiliated and did thereby affiliate the University College of Dundee to and make it form part of the University of St. Andrews. This instrument was not published or laid before parliament or submitted to Her Majesty for approval, as required by sect. 20 in the case of all ordinances made by the Commissioners:—

Held, that the order of the Commissioners contained all the elements of an "ordinance" properly so termed, and that although sect. 16 gave the power of affiliation to the Commissioners in direct terms without requiring them to make an ordinance for that purpose, yet, having regard to the language of sects. 19 and 20, taken in connection with other clauses, it appeared to be the general policy of the Legislature that all acts of the Commissioners altering the constitution of a university, and necessarily affecting interests public or private or both, should be attended with the precautions and safeguards provided by the statute; that the instrument

executed by the Commissioners must, therefore, be taken to be an "ordinance," subject to the procedure enacted by sect. 20 with regard to "ordinances," and that for want of due compliance with this procedure it was invalid.

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COX.

APPEAL from a decision given by the majority of the judges in the Court of Session, Scotland (1), dated the 19th of December, 1894, which affirmed the judgment of the Lord Ordinary (Stormonth-Darling), given on the 7th of July, 1894. The facts; the sections of the Universities (Scotland) Act, 1889, in question; and the names of the judges who took part in the cause in the Court of Session, are fully set out in the judgments of the Law Lords. It is necessary only to state here that the Universities (Scotland) Act, 1889 (52 & 53 Vict. c. 55), appointed a commission charged with the duty of making provision for improving the administration of the Scottish Universities. Sect. 20 declared that "all ordinances" made by them should not be effective until, inter alia, laid before Parliament. Then, under the subject of "extension of universities," sects. 15 and 16 confer powers upon them—sect. 15 being of general application to all the Scottish universities, and authorizing the Commissioners to make ordinances to extend any of these universities by affiliating new colleges—sect. 16 dealing with the special case of the University of St. Andrews and the University College of Dundee. This latter section did not contain the word "ordinance," but enacted that, "without prejudice to any of the powers hereinbefore conferred," the Commissioners should have power to affiliate the university and the college, and make the latter form part of the university with the consent of the University Court and of the college. The Act of 1889 came into force on the 1st of January, 1890; and on the 21st of March, 1890, the Commissioners, with the stipulated consents given in an agreement dated the 15th of February, 1890, executed an instrument in writing sealed with their common seal, by which they finally and once for all purported under sect. 16 of the Act to effect the union between the university and the college. This instrument was not laid before parliament, but was acted on at once and without question of its validity until about

(1) 22 Court Sess. Cas. 4th Series (Rettie), 210.

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March, 1893. And on the 24th of November, 1890, an ordinance regarding the election of representatives, to the University Court, by the University College of Dundee, under sect. 15 of the Act, was made by the Commissioners, and received the sanction of parliament. In the agreement of the 15th of February, 1890, the Commissioners made but a few slight verbal changes, and it was attached to the instrument of the 21st of March, 1890, as a schedule. It commenced by providing that the University College of Dundee shall be affiliated to and form part of the University of St. Andrews in terms of sect. 16 of the Act of 1889 in the manner and upon the terms as follows: (1.) "The said union shall, as regards duration, be permanent, and dissoluble only by Act of Parliament."

By summons, dated the 2nd of March, 1894, the appellants, Metcalfe and others, members of the University Court, who were not parties to the agreement of the 15th of February, 1890, and six members of the Senatus Academicus of the university, sought to have (1.) The instrument of the 21st of March, 1890, reduced on the ground that the Commissioners had no power to effect a union under sect. 16 except by means of an order or ordinance to be published, laid before parliament, and submitted for the approval of Her Majesty in Council as provided for by sects. 19 and 20 of the Act, and, secondly, the consequential order of the 10th of April, 1890, following on the union, declaring in terms of sect. 5 of the Act the new University Court of the university as duly constituted. The summons also asked for reduction of a minute of the University of St. Andrews of the 15th of February, 1890, consenting to the union and the agreement of the same date, bearing to be made between the University Court and the Council of the University College of Dundee; and a docquet, appended to a letter of the Clerk to the Commissioners, by which it appeared the University Court had agreed to the verbal alterations made by the Commissioners. On these last-mentioned three documents no argument was addressed to the House and no opinion as to their validity was given.

The respondents Cox and others represented the Council of the University College of Dundee, who maintained that the union had been legally effected.

March 25, 26. *Finlay*, Q.C. (with him *C. S. Dickson*, and *J. C. Pitman*, both of the Scottish Bar), for the appellants :—

The instrument in writing dated the 21st of March, 1890, is invalid. The procedure which the statute provided (sects. 14, 15, 19, and 20) in the case of ordinances has not been followed. If parliament had intended that no objection to an order affiliating the college should be entertained it would have said so in unequivocal language, especially when it is considered that the sanction of parliament is required in the case of orders of less importance. Either the writing of the 21st of March, 1890, is an ordinance, and consequently invalid under sect. 20, or if not an ordinance it is invalid, for the Commissioners had no power to effect such a union except by ordinance. The effect of the order of the 21st of March, 1890, is to shut out every one who had any objection to make: because (1.) sect. 21 deals only with the revocation of ordinances ; (2.) the agreement of the 15th of February, 1890, declares the union dissoluable only by Act of Parliament. Moreover, Dundee College having been granted representatives in the University Court, both on the footing of affiliation under sect. 15 (sect. 5, sub-sect. 1 (*i*), (*c.*)), and the more intimate union under sect. 16 (sect. 5, sub-sect 1 (*i*), (*k*)) it has been given a double representation to which it is not entitled.

[He also commented on the Universities (Scotland) Act, 1858 (21 & 22 Vict. c. 83).]

Sir *Henry James*, Q.C., *Asher*, Q.C. (of the Scottish Bar), and *Alexander Robertson*, for the respondents :—

The order of the 21st of March, 1890, is valid. The Legislature must be taken to have known that the arrangement between the two institutions was so far advanced that they were ripe for union, and, in the special circumstances of the case, gave the Commissioners by the exceptional language of sect. 16 an absolute power to affiliate the college at once, and thus obviate the delay which would follow if the procedure created by sects. 19 and 20 were followed. There is a complete change in the language of sect. 16 from that in sect. 15, shewing that the Legislature

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intended an exemption from sect. 20. The word "ordinance" is not used. Even if the order of the 21st of March, 1890, cannot be supported there has been a delay of three years, and to declare the instrument invalid would cause enormous inconvenience. Then there is an ordinance of the 24th of November, 1890, assented to by the acquiescence of parliament. Can it be set aside if the Act of Union of the 21st of March, 1890, is set aside?

Finlay, Q.C., in reply:—

The ordinance of the 24th of November, 1890, being passed on the basis of the order of the 21st of March, 1890, being valid will, on the latter order being declared invalid, cease to be operative.

LORD HERSCHELL L.C.:—

This action was brought to obtain reduction of an order made by the Commissioners appointed under the Universities (Scotland) Act, 1889, and to have it declared null and void. The instrument in question, after reciting that by sect. 16 of the Act just referred to, the Commissioners were empowered to affiliate the University College, Dundee, to, and make it form a part of, the University of St. Andrews, with the consent of the University Court of the University of St. Andrews, and also of the said college; and also reciting that the said University Court and the University College of Dundee had consented to affiliation upon the conditions set forth in the schedule thereunto annexed, proceeded as follows: "Therefore the Commissioners, under the said Act, have affiliated and do hereby affiliate the said University College of Dundee to and make it form part of the said University of St. Andrews, subject to the said conditions and in terms of the said statute."

The ground upon which the appellants impeach this instrument is, that the procedure which the statute prescribes in the case of ordinances made by the Commissioners has not been followed. On the part of the respondents, it is contended that the provisions relating to ordinances have no application to an order made under the 16th section of the Act affiliating University

College, Dundee, to, and making it form part of, the University of St. Andrews. The question turns upon the construction of that section.

The general powers of the Commissioners are contained in the 14th section of the Act. They are thereby empowered to make ordinances for a great variety of purposes specified under sixteen different heads. Then follow the 15th and 16th sections of the Act, which are grouped together under the heading "Extension of Universities," and it cannot be disputed that the subjects with which they deal are closely allied. The 15th section provides that the Commissioners may, if they think fit, "make ordinances to extend any of the universities, by affiliating new colleges to them," subject to certain conditions, one of which is that the University Court and the college shall be consenting parties. The 16th section enacts that, "without prejudice to any of the powers hereinbefore conferred, the Commissioners shall, with respect to the University of St. Andrews and the University College of Dundee, have power: (1.) To affiliate the said University College to and make it form part of the said university, with the consent of the University Court of St. Andrews, and also of the said college, with the object, inter alia, of establishing a fully-equipped conjoint university school of medicine, having due regard to existing interests, and to the aims and constitution of the said college, as set forth in its deed of endowment and trust."

Leaving aside for the moment the means by which the object was to be accomplished and the nature of the power conferred, which are in controversy, it is clear that the main object aimed at in this enactment was to enable a closer union to be brought about between the University of St. Andrews and University College, Dundee, than could have been effected under the provisions of sect. 15. It contemplated something more than mere affiliation—namely, an affiliation of the nature of an incorporation. At the same time, it must be borne in mind that it was an enabling section only; it did not treat such an affiliation as a foregone conclusion. Moreover, it left it open to the Commissioners to proceed to affiliate the college to the university under the provisions of sect. 15, if the university and the college,

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though unable to agree to the kind of affiliation contemplated by sect. 16, were consenting parties to an affiliation of a less intimate nature. Before criticising the language of sect. 16, and the arguments which were addressed to your Lordships with regard to it, I propose to consider the procedure which must have been followed if affiliation was to be effected under sect. 15.

It is not necessary to refer in detail to all the provisions of sect. 19. It will suffice to state that the Commissioners were required, not only to send copies of the draft of any ordinance they proposed to the University Court, the Senatus Academicus, and the General Council of each university to which the ordinance related, but also at the same time to cause it to be published in such manner as they thought sufficient "for giving information to all persons interested." During three months after the transmission of the draft ordinance to the University Court the Commissioners were directed to receive any objections and any amendments submitted in writing, not only by the university authorities named, but "by any member or members of them, or by any public body or persons directly affected thereby"; and after the expiration of the three months the Commissioners were to proceed to consider such objections and amendments. The amplest security was taken by these provisions that no ordinance should be finally settled by the Commissioners until an opportunity had been afforded, not only to the university bodies in their collective capacity, but to every individual member of them, as well as to all persons whose interests might be affected, to lay their views before the Commissioners, and until those views had been considered.

But this was not all. Sect. 20 prescribed that "all ordinances made by the Commissioners" should be published in the *Edinburgh Gazette* for four consecutive weeks, and should be laid before both Houses of Parliament. If neither House within twelve weeks presented an address praying the Queen to withhold her assent from the ordinance, it was to be lawful for the Queen in Council by Order to approve of the same. Besides the power reserved to parliament to pray Her Majesty to withhold her assent to an ordinance, the University Court, Senatus Academicus, or General Council of any university or any govern-

ing body, or the trustees or patron of any endowment, or any other person directly affected by an ordinance, were empowered to petition the Queen to withhold her approbation therefrom. Any such petitions were to be referred to the Universities Committee of the Privy Council, who might hear the petitioners by themselves or counsel, and report to Her Majesty in Council on the matter; and the Queen was thereafter, by Order in Council, either to declare her approbation or her disapproval of the ordinance in whole or in part. Sect. 20 concludes with this provision: "No such ordinance shall be effectual until it shall have been so published, laid before parliament, and approved by Her Majesty in Council." I have referred to the provisions of sects. 19 and 20, especially in connection with ordinances for affiliation made under sect. 15; but they, of course, apply equally to all ordinances made by the Commissioners, and, therefore, to the exercise by them of their power to deal with all the subjects specified in sect. 14.

It is impossible to study the procedure laid down in the sections referred to without seeing that it was the scheme of the Legislature most anxiously to safeguard all interests that might be affected by the manner in which the Commissioners exercised the powers conferred upon them. It was not content with securing that all persons interested should receive due notice, and that their representations should be considered by the Commissioners; the control of parliament was jealously reserved, and any person directly affected had the right of appealing to a Committee of the Privy Council, one member of which was to be a member of the Judicial Committee. I do not say that these enactments exhibit a distrust by parliament of the Commissioners, but they do most clearly indicate that parliament was not prepared to leave them to mould the universities and to modify their constitution and arrangments except under the strictest control. The payments to be made by students, the course of study, the manner of examination, the preservation, administration, and maintenance of the property and fabrics of buildings connected with the universities or colleges, the custody and management of university libraries and laboratories, and the contents and furniture thereof, these

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and many other details of university management can only be touched by the Commissioners, subject to the supervision of parliament and the Universities Committee of the Privy Council.

Turning again to the subject of affiliation, with which your Lordships are now more immediately concerned, even though the University Court and the college be both consenting parties, the Commissioners can only carry out the affiliation according to the procedure and under the control to which attention has been called. Under these circumstances it is natural to ask whether the Legislature can have intended that where the Commissioners decide upon a scheme, not of affiliation merely, but of affiliation involving incorporation, the matter was to be left to the unfettered discretion of the Commissioners, without any security that the objections of persons interested would be weighed and considered, and without parliament having a voice in its ultimate determination.

It was argued that the affiliation could not take place under sect. 16 without the consent of the University Court and the college, and that this was a sufficient safeguard. But parliament did not so regard it in the case of an affiliation by ordinance under sect. 15, where the same consents are requisite. And this was only natural, for the University Court might give its consent, although the Senatus Academicus and other persons directly affected were hostile to the scheme.

No reason at all satisfactory to my mind has been given why the Legislature should so carefully have subjected the action of the Commissioners to control, when they were dealing with matters of comparatively trivial importance, and have left their powers absolute and free from supervision when they were dealing with so large and vital a subject as the incorporation of University College with the University of St. Andrews. It is said that parliament knew that negotiations were so far advanced between the two institutions that an agreement was imminent. I do not doubt that it was contemplated as probable that an affiliation of the nature provided for by sect. 16 would be brought about. But the terms of the Act shew that it was not regarded as certain. This appears not only from sect. 16, but from sect. 5,

sub-sect. 1 (*c*), which makes the principal of University College, Dundee, a member of the University Court of St. Andrews only "if and when" the college is affiliated to and made to form part of the university. The affiliation was made dependent on consents which might never be obtained. It is common experience that the governing bodies of public institutions may be agreed upon the policy of a union between them, and may even be agreed upon the main lines which it should follow, and that, nevertheless, when details come to be discussed, insuperable difficulties are found to arise. But even if, as anticipated, the University Court and the college came to an agreement, why should the many persons vitally interested, who might, though not hostile to the policy of a union, yet be strongly opposed to the details of the scheme, be left without protection, with no statutory right to represent their views, or to have them considered, and with no power to appeal, either to parliament or to the Privy Council? No answer was really given to this question by the learned counsel for the respondents.

Then it was urged that this exceptional method of dealing with the affiliation of the two institutions affected was designed to obviate the delay which would have been invoked if the procedure indicated by sects. 19 and 20 was to be followed. What is there to shew that such delay would be any more prejudicial in this case, or would be so regarded by parliament, than in many of the cases dealt with under sect. 14? On the contrary, it would seem more important that these should be dealt with speedily, than a fundamental change of a far-reaching character, and which must materially affect many interests. In short, I listened in vain for any adequate reason for the grave distinction which it is contended the Legislature has made.

The respondents insist that any arguments addressed to your Lordships for the purpose of shewing that it is not likely that parliament would enable the Commissioners to act under sect. 16 free from the control to which their proceedings under sects. 14 and 15 would be subject, cannot have any effect given to them if the statute has enacted that they may do so. I entirely assent to this proposition. If, in unequivocal language, parliament had said that they might thus act, there would be an end

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of the case; but if this is not clear, if the language of sect. 16 is fairly capable of an interpretation which would avoid the anomalies to which the appellants point, then I apprehend the considerations to which I have been adverting may fairly weigh in determining what interpretation should be put upon the statute.

The respondents naturally rely on the circumstance that whereas in sects. 14 and 15 power is in terms given to the Commissioners to make ordinances for certain purposes, sect. 16 says that they shall have power to affiliate the college to the university, and nothing is said about an ordinance. That is perfectly true; but sect. 16 is altogether silent as to the means to be adopted for affiliating. The affiliation is not a physical act to be performed by the Commissioners; they can only affiliate and make the college a part of the university by some instrument declaring that it shall become so. It is not disputed that such an instrument was contemplated; it is only by means of it that the Commissioners can act. Looking at the close connection of sects. 15 and 16, and at the fact that the power conferred by the latter was to be "without prejudice to any of the powers hereinbefore conferred," it seems to me natural to conclude (the enactment being silent on the subject) that the Commissioners were to exercise their power under sect. 16 by an instrument of the same nature and with the same incidents as would be employed for the exercise of their powers under the previous sections. The word "ordinance" has no technical signification; it means no more than an instrument embodying an order or direction.

If the word "ordinance" had not been used in the statute, it is, I think, the name which would naturally have been applied to all orders of the Commissioners determining within the limits of their powers what should be the future constitution, management, or arrangements of the universities or colleges. It is an apt word to denote the document which embodies the orders of a quasi-legislative body such as the Commissioners are.

It is said that the power conferred by sect. 16 is "to affiliate" in the manner described, and not to make an ordinance for that purpose. But I think that the word "power" is used in

reference to the thing to be done, and not to the method of doing it. I am confirmed in this view by the words with which the section commences, "Without prejudice to any of the powers hereinbefore conferred." In reply to the question, to what powers reference was there made, the answer given by the counsel for the respondents (and, I think, rightly) was, to the powers conferred by sects. 14 and 15.

But, in the view taken by the respondents, there was but one power conferred by those sections, namely, the power of making ordinances; and, if that were so, it would be inappropriate to speak of "any of the powers," as if they were several in number. The language used indicates, to my mind, that reference was being made, not to the power of making ordinances, but to the different changes in university matters which the Commissioners had authority to make by means of ordinances. It is in the same sense, I think, that the word "power," which immediately follows the words upon which I have been commenting, is used.

I think the only purpose of sect. 16, sub-sect. 1, was to enlarge the objects which the Commissioners might accomplish, by enabling a more intimate union to be created in the particular case than was provided for by the preceding section.

My Lords, I concur with the learned judges who were in the minority in the Court below in thinking that it was not intended that this should be carried out by any different means from those which were to be employed in the case of the other changes in university constitution, or management, the determination of which was committed to the Commissioners.

It is urged by the respondents that if this be so, it cannot be correct to say that the Commissioners have power to affiliate the college, and make it form part of the university, inasmuch as all the ordinances made by the Commissioners are ineffectual unless approved by the Queen in Council. I do not feel pressed by this argument. Although it is true that an ordinance might be disapproved of, and might therefore never become effectual, yet, when approved of, that which is ordained by it takes effect by the act of the Commissioners, and it does not seem to me inaccurate to say that the Commissioners have power to do everything which they can direct to be done by an ordinance,

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merely because that ordinance is made subject to the approval of the Sovereign. It is a common case for appointments made by one public official to require the approval of another. Such appointments cannot take effect without that approval; but I do not think that any one would hesitate to say that the appointment was made by the person who selected and nominated the appointee.

A further argument was addressed to your Lordships, based upon sub-sect. 2 of sect. 16. It was said that if the contention of the appellants were to prevail, the University Court of the University of St. Andrews might not be capable of being constituted in time for that Court to give notice of their determination to submit draft ordinances within three months after the commencement of the Act, and that therefore the machinery contemplated by the earlier part of the section must be such as would render this possible. The argument is an ingenious one; but I do not think it can prevail against the considerations which I have laid before your Lordships. It may be that the point was overlooked, and it is certainly not of much importance. The order of the Commissioners made in accordance with the respondents' contention was dated only a few days before the expiration of three months from the commencement of the Act, and even if the University Court failed within three months to give the notice with reference to draft ordinances provided for by the 19th section, there is no doubt that the Commissioners in framing any ordinance for a university would give due consideration to the representations of its University Court.

For these reasons I think that the order of the Commissioners which the appellants impeach cannot be supported.

It was contended for the respondents, that even though this conclusion be arrived at, there had been such delay and change of circumstances in the meantime as to disentitle the appellants to relief. In view of the considerable time which was certainly allowed to elapse before proceedings were taken to question the act of the Commissioners, I should not be indisposed to refuse relief on this ground if I thought it could properly be done; but, having carefully considered the matter, I

am unable to find any facts established which would justify such a course.

The summons in the action asks also for a reduction of the minute of the University Court of St. Andrews of the 15th of February, 1890, and the agreement of the same date bearing to be made between the University Court and the Council of University College, Dundee. No argument was addressed to your Lordships upon the questions thus raised, and I pronounce no opinion upon them.

I think the appeal must be allowed.

LORD WATSON :—

My Lords, sect. 16 of the Universities (Scotland) Act, 1889, gives the executive Commissioners thereby appointed power to affiliate the University College of Dundee to "and make it form part of the University of St. Andrews, subject to the consent of the University Court of St. Andrews, and also of the said college, with the object, inter alia, of establishing a fully-equipped conjoint university school of medicine, having due regard to existing interests, and to the aims and constitution of the said college, as set forth in its deed of endowment and trust."

In February, 1890, the University Court of St. Andrews and the council of the college entered into an agreement, which embodied the terms and conditions upon which they were willing to become united, under sect. 16 of the Act. One of these terms was that the union "shall, as regards duration, be permanent, and dissoluble only by Act of Parliament." The agreement was submitted to the Commissioners, who made three slight alterations, two of them verbal merely, in its terms; and on the 21st of March, 1890, they issued what in these proceedings has been called an order, by which they affiliated the University College of Dundee to, and made it form part of, the university, in terms of the Act, and subject to the conditions expressed in the agreement which was annexed to and incorporated with their order.

The Act nowhere makes mention of "orders"; but sect. 19, which is headed "Procedure," and sect. 20, which is headed

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"Ordinances made by the Commissioners," make careful provision for protecting the rights and interests of all public bodies and persons which might possibly be affected by the contemplated changes in the constitution and arrangements of the university. The first of these clauses requires that, when the Commissioners have prepared the draft of any ordinance, they shall send printed copies of it to the University Court, the Senatus Academicus, and the General Council of each university to which it relates; and shall also cause it to be published in such manner as they think sufficient for giving information to all parties interested. During a period of three months after the transmission of the draft ordinance (in which the months of August and September are not to be computed), the university authorities already mentioned, and any public body or private person directly affected by the draft ordinance, may send written objections to, or amendments upon, the ordinance to the Commissioners, by whom, after the expiry of the period, these objections and amendments must be duly considered. By the second of these clauses it is provided that "all ordinances" made by the Commissioners shall be published in the *Edinburgh Gazette*, and shall be laid before both Houses of Parliament, and shall thereafter be submitted for the approval of Her Majesty in Council. If either House presents an address praying the Queen to withhold her assent from an ordinance or any part of it, it is made lawful for the Queen in Council to approve of any part of the ordinance to which the address does not relate. It is also provided that the same bodies and persons, who are allowed to make representations against a draft ordinance, may petition Her Majesty in Council against the whole or part of any ordinance; and it is declared that no ordinance shall be effectual until it shall have been so published, laid before parliament, and approved by Her Majesty in Council.

The Commissioners' order of the 21st of March, 1890, was not communicated in draft, nor was it published, laid before parliament, or submitted for Her Majesty's approval. It was issued, and has been treated as an order which was to take immediate effect, without any of these precautions having been observed. The present action was brought by three members of the

University Court, who were not parties to the agreement of February, 1890, and by six members of the Senatus Academicus of the university, for the purpose, inter alia, of having the order in question reduced and set aside, upon the ground that the Commissioners had no statutory power to effect any union between the college and university, under sect. 16, except by means of an order or ordinance to be published, laid before parliament, and submitted for the approval of Her Majesty in Council, as provided by sects. 19 and 20 of the Act. They have also pleaded that it was ultra vires of the Commissioners to enact or sanction any condition to the effect that the union should not be dissoluble, unless by an Act of the Legislature. The only parties called, who have appeared in defence to the action, are the respondents in this appeal, being the individual members of the Council of University College, Dundee, as such members, and as representing the council.

The Lord Ordinary (Stormonth-Darling) sustained the fourth plea in law stated for the present respondents, which is in substance to the effect that the order sought to be rescinded was authorized by the Act. He accordingly assoilzied the respondents, with expenses. On a reclaiming note, the learned judges of the Second Division being equally divided in opinion, sought the aid of the other Division of the Court. At final advising, the Lord Justice Clerk, with Lords Adam, M'Laren, Trayner and Wellwood, agreed with the Judge of First Instance, whilst Lords Young and Rutherfurd-Clark were of opinion that the pursuers were entitled to decree of reduction in terms of their summons. The interlocutor of the Lord Ordinary was therefore affirmed.

Had it not been for the opinions entertained by so large a majority of the learned judges in the Courts below, I should have had less difficulty in coming to the conclusion that, in effecting the union of the college with the university by means of a peremptory and final order, the Commissioners have exceeded the jurisdiction conferred upon them by the Act. But after careful consideration of the provisions of the Act, I have been unable to find any sufficient reason for rejecting the conclusion which was arrived at by Lord Young and Lord Rutherfurd Clark.

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It appears to me that, not only the terms of sect. 16, but the whole context of the statute, so far as it may have a bearing on that clause, tend to the inference that so important a change in the constitution of the university, necessarily affecting the status and interests of many members of the university, and, it may be, of the college also, whose collective or individual interests were not represented by the University Council, or by the council of the college, was not meant to be effected, unless by an ordinance which was not to become operative until approved by Her Majesty, after those members had full opportunity of submitting their objections to the Commissioners, to Parliament, and to the Queen in Council.

Sects. 15 and 16 are, in my opinion, cognate clauses, and they are classed together under the statutory title, "Extension of Universities." Sect. 15 provides that the Commissioners may, if they think fit, "make ordinances to extend any of the universities by affiliating new colleges to them," subject to certain conditions specified in five sub-sections, which it is unnecessary to notice in detail. The powers conferred by the clause are limited to affiliation, which, as interpreted by sect. 3, means nothing more than the establishment of such a connection between the university and the college as will not interfere with the separate and independent constitution of either body, and does not include their incorporation so as to make them form one body.

The provisions of sect. 16 are not general; they apply to one university and one college only. They empower the Commissioners, in dealing with the University of St. Andrews and the University College of Dundee, to go beyond affiliation, and to make the college "form part of the said university." The clause is not a wholly independent enactment, but is connected with sect. 15 by its introductory words, which appear to me to have a material bearing upon the present question. It commences thus: "Without prejudice to any of the powers hereinbefore conferred, the Commissioners shall, with respect to the University of St. Andrews and the University College of Dundee, have power": then follows an enumeration of the specific things which the Commissioners are authorized to do for the purpose of

incorporating the college with the university. It is clear that the powers thus conferred were meant, not to supersede, but to be supplementary to, the powers already given to the Commissioners of dealing with the university and college under sect. 15. In my opinion the introductory reference to "the powers hereinbefore conferred" has exclusive relation to those changes in the university system which, by sect. 15, the Commissioners are authorized to make, and does not extend to the manner in which those changes are to be accomplished. If that be so, it necessarily follows that the machinery provided for carrying into effect the powers added by sect. 16 must be the same with that provided in sect. 15. On the other hand, if it were assumed that a power to make ordinances is one of the powers referred to in the introductory enactment of sect. 16, it appears to me that the same result would follow. The powers conferred by sect. 16 are to be "without prejudice" to the powers already given. The plain meaning of an enactment in these terms is, that the powers referred to are to be read in connection with the provisions of sect. 16, and are to remain operative, except in so far as they are inapplicable to, or inconsistent with, those provisions. I need hardly add that there does not occur in sect. 16 a single expression, indicating the intention of the Legislature that the union of the university and college is to be carried out by some Act of the Commissioners other than an "ordinance" within the meaning of the Act.

The Lord Ordinary appears to have come to the conclusion that, in the absence of any mention of an ordinance in sect. 16, the Commissioners were right in assuming that they had power to effect the union of the university and college "by way of order and not by way of ordinance." Even if the words "by way of order" had occurred in the clause, it is by no means clear to my mind that they would have justified the result at which his Lordship arrived. "Order" and "ordinance" are really synonymous terms, and the provisions of sects. 19 and 20, taken in connection with other clauses, appear to me to indicate so plainly the intention of the Legislature that all acts of the Commissioners altering the constitution of a university, and, necessarily, affecting interests public or private, or both, should be

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attended with the safeguards which the statute provides, that I venture to doubt whether your Lordships could have recognised any distinction between an ordinance and an order, unless the latter word had been followed by some such expression as "which shall be final and not subject to review." I may observe that the Lord Justice Clerk and Lord M'Laren, in whose opinions the other judges composing the majority of the Inner House simply concurred, in quoting and commenting upon the terms of sect. 16, omit from their quotation, and omit to notice, the introductory words of the section upon the construction of which the present question mainly depends. That omission, in my opinion, detracts very materially from the force of their reasoning. The connection which these introductory words establish between sect. 16 and the preceding clause was fully discussed by both the learned judges of the minority, and forms one of the main, if not the main, ground of their judgments.

Counsel for the respondents argued, in support of the judgments appealed from, that the Legislature knew, or must be held to have known, that the university and the colleges were ripe for union, and must therefore have intended that its consummation should take place at once, without the necessity of imposing any of the safeguards which were deemed necessary in other cases. In my opinion, were the facts upon which that conclusion is rested fully proved, they would be insufficient to overcome the inference derivable from the language which the Legislature has employed. But the facts, if they can be so called, rest on the merest speculation, and are certainly not suggested by the terms in which sect. 16 is expressed. In that clause the affiliation of the college to, and its incorporation with, the university is described as an event which may or may not occur; and even if it should occur, it was obviously not contemplated that the union should be immediate, because special directions are given to the Commissioners in case of its being unreasonably delayed. Again, in making the union, the Commissioners are directed to "have due regard to existing interests." It is not easy to understand how that direction could be fulfilled by following a course which denied to persons interested any opportunity of vindicating their interests before the Commis-

sioners or elsewhere. In view of these enactments there can be no probability that the Legislature, whilst giving all parties affected an opportunity of attending to their interests in all cases where mere affiliation is contemplated, should have withheld that opportunity in the case where a more radical change in the constitution of a university is in contemplation.

I do not think it necessary to express any opinion upon the question whether a union between the university and the college, duly carried out in terms of sect. 16, would or would not be dissoluble otherwise than by an Act of Parliament. But I am clearly of opinion that a condition, declaring that it is only dissoluble by the Legislature, ought not to be inserted in any Act or ordinance effecting the union, because it must be either superfluous or illegal. If no provision is made by the Act for the severance of the two bodies when once united, the condition is mere surplusage. If such provision be made, the condition is in contravention of the statute.

I am accordingly of opinion that the judgments appealed from must be reversed, and that the appellants ought to have a decree reducing and setting aside the order of the Commissioners dated the 21st of March, 1890, and also the consequential order of the 10th of April, 1890. That decree will not exhaust the conclusions of the summons, which crave reduction of three other documents; these being—(1.) a minute of the University Court of St. Andrews, dated the 15th of February, 1890, consenting to the union; (2.) an agreement of the same date, being the agreement upon which the order of the Commissioners was based; and (3.) a docquet appended to a letter of the clerk to the Commissioners, bearing to be a consent by five members of the University Council to the alterations made by the Commissioners upon the terms of the agreement. Your Lordships are not in a position to dispose of these conclusions, because the arguments addressed to the House had no bearing upon them, and the grounds upon which their reduction is sought are altogether different from those upon which the validity of the Commissioners' order has been impeached. With the exception of the Lord Ordinary, none of the learned Judges of the Court of Session take any notice of these conclusions. In these circumstances they must

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be remitted to the Court below for consideration and disposal, if the appellants think fit to insist on them.

LORD ASHBOURNE:—

My Lords, I concur. The case turns upon the construction of sect. 16, so often referred to. I can see no reason of any substance for the serious distinction sought to be introduced into this section. I cannot see why parliament should free the Commissioners, when acting under that section, from all the restraints and conditions to which their action was subject when acting under sects. 14 and 15. In my opinion, on the construction of sect. 16 the Commissioners were bound to exercise their powers in the same way and subject to the same control as were enacted in reference to the preceding sections.

LORD MACNAGHTEN:—

My Lords, the Universities (Scotland) Act, 1889, appointed a temporary Commission, charged with the duty of making provision for improving the administration of the Scottish universities and extending their usefulness. Large powers were placed in the hands of the Commissioners for the purpose of reconstruction and reform—powers of inquiry, review, and legislation. But at the same time it was provided by sect. 20 of the Act that "all ordinances made by the Commissioners" should be published in a certain manner, laid before parliament, and submitted to Her Majesty for her approval. And then the section proceeds to declare that "no such ordinance shall be effectual until it shall have been so published, laid before parliament, and approved by Her Majesty in Council." The previous section contains provisions calculated to ensure the fullest publicity for every ordinance prepared by the Commissioners while yet in draft. The draft was to be circulated in print. Then a period of three months was to elapse, during which all bodies and persons directly affected were to be at liberty to make objections and suggest amendments, and the Commissioners were bound to consider all such objections and amendments before the ordinance was made. Under this course of procedure, all those interested

in the matter had the opportunity of laying their case before the Commissioners, before parliament (if their representatives thought fit), and before the Privy Council. Thus every precaution was taken against hasty and ill-considered action, or any possible slip or inadvertence on the part of the Commissioners.

Among the subjects entrusted to the Commissioners was the extension of the universities by the affiliation of colleges hitherto unconnected with them. Affiliation for the purposes of the Act is defined to be "such a connection between an existing university and a college as shall be entered into by their mutual consent under conditions approved by the Commissioners, or after the determination of their powers by the Universities Committee." The subject is dealt with in sects. 15 and 16, under the head of "Extension of Universities." In both sections the condition of mutual consent is repeated and enforced. Sect. 15 is of general application. It authorizes the Commissioners, and after the expiration of their powers the University Court, to make ordinances to extend any of the universities by affiliating new colleges to them subject to certain specified conditions, including a condition that the connection should be dissolved on a resolution to that effect being passed either by the University Court or by the college. Sect. 16 appears to be in the nature of a rider to sect. 15, and subsidiary to it. It deals only with the special case of the University of St. Andrews and a college recently founded and endowed in Dundee, called the University College of Dundee. It begins with the words "without prejudice to any of the powers hereinbefore contained," and it declares that the Commissioners shall, with respect to that particular university and that particular college, have power to affiliate the college to, and make it form part of, the university with the consent of the University Court and of the college, "with the object, inter alia, of establishing a fully-equipped conjoint university school of medicine, having due regard to existing interests, and to the aims and constitution of the said college, as set forth in its deed of endowment and trust."

There seems to have been some difference of opinion in the Court below as to the precise object of sect. 16 and the reason for its insertion. It is enough, I think, to say that it appears to

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provide for a connection somewhat closer than that involved in affiliation, and to dispense with the condition that the connection should be dissoluble at the will of either party. It is more important to observe that there is nothing in the section about making an ordinance for the purpose of effecting the object which the section had in view. Whether that omission (if it be an omission) affects the powers of the Commissioners, or the way in which those powers are to be exercised, is the principal question in the case.

Except for certain special purposes the Act did not come into operation till the 1st of January, 1890. On the 21st of March, 1890, the Commissioners, under their common seal, executed an instrument in writing, by which they declared that they had affiliated, and did thereby affiliate, the University College of Dundee to, and make it form part of, the University of St. Andrews, subject to certain conditions set forth in the schedule thereto. The schedule contained an agreement purporting to be an agreement for the union of the college with the university on terms arranged by mutual consent between the college and the University Court.

The instrument of the 21st of March, 1890, was not published or laid before parliament, or submitted to Her Majesty for her approval, as required by sect. 20, in the case of all ordinances made by the Commissioners. For want of due compliance with those requirements its validity is impeached by the appellants. On the other hand, the respondents contend that the instrument in question is not an ordinance within the meaning of that term as used in the Act. It is an order, they say, not an ordinance—an order deriving force and efficacy from the fiat of the Commissioners alone, requiring neither publication nor presentation to parliament, nor the approval of Her Majesty in Council, to make it effectual.

My Lords, I have listened attentively to the able argument on behalf of the respondents, and I have carefully read the judgment of the Lord Ordinary and the opinions of the learned Judges of the Court of Session who agreed with him. But I must say I am quite at a loss to appreciate the distinction taken between an order and an ordinance in this case. There is no

statutory definition of the word "ordinance." It is not a cabalistic formula. It is a common English word, with a well-known meaning. Taking it in its ordinary signification, I cannot see that anything is lacking in the instrument of the 21st of March, 1890, to constitute an ordinance properly so termed. It seems to have all the essential elements of an university ordinance or statute. It was intended to be, and if valid it would be, part of the body of law governing the university, and regulating now and in time to come the relations between the university and an affiliated college incorporated with it.

If this view be right, it seems to me that there is no escape from the conclusion for which the appellants contend. No exemption of any sort or kind is to be found in sect. 20. The language is perfectly general: "All ordinances made by the Commissioners"—all ordinances without exception—must follow the prescribed course, otherwise they are not effectual.

The learned counsel for the respondents did not, as it seems to me, seriously grapple with this part of the argument. They dwelt mainly on the difference in language between sect. 15 and sect. 16. In the latter section they pointed out that the power of affiliation is given directly to the Commissioners. In the former the Commissioners have only the power of making ordinances to extend any of the universities by affiliation. The ordinance is inoperative without more. The real power, they said, is in Her Majesty in Council. But there is a fallacy, I think, in that view. The power is in the Commissioners, though they do proceed by ordinance. The power, no doubt, is in suspense until the ordinance is duly published, laid before parliament, and approved by Her Majesty in Council. But when the final stage is safely reached whatever the ordinance does is the doing of the Commissioners. And moreover, though the power be given to the Commissioners in direct terms, they can only act by some instrument in writing which cannot, as it seems to me, by any ingenuity be distinguished in substance and effect from an ordinance.

Some stress was laid on the inconvenience which it was suggested would arise if the order of the Commissioners must

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follow the regular course of an ordinance. The arrangement, it was said, was all but complete when the Act passed, and so Parliament must have meant it to be disposed of offhand without the usual formalities. But parliament has certainly not said so. No doubt one may gather from the Act that there was every reason to hope that the incorporation of University College, Dundee, with the University of St. Andrews would not long be delayed. But at the same time, in view of the first election of assessors, we find that provision is made for the event of the incorporation not taking place within a reasonable time; so that contingency was certainly not regarded as beyond the bounds of possibility; and after all, the inconvenience of some little delay (during which, it must be remembered, the old powers of the University Court could be exercised though its new powers were suspended) is not to be weighed against the immense advantage of settling, as far as possible, to the satisfaction of everybody, and after everybody interested had been heard, a complicated arrangement on which the future of the university in a great measure would depend. It would indeed be strange if in a case of great importance—of greater importance probably than any other measure contemplated at the time, and one in which the Commissioners are expressly directed to have regard to existing interests—parliament should have thought fit to dispense with those precautions and safeguards without which the most trifling change in the details of university administration could not be effected. I cannot think that that could have been the intention of parliament. If it had been, I have no doubt parliament would have said so plainly. And, therefore, thinking as I do that the instrument of the 21st of March, 1890, is an ordinance, and nothing but an ordinance, and finding that the requirements of sect. 20 have not been complied with, and not finding anything in the Act to lead one to think that those requirements were to be dispensed with in the case contemplated by the 16th section, I can only come to the conclusion that the judgment under appeal is erroneous.

For these reasons, I concur in the motion which has been proposed.

LORD HERSCHELL L.C.:—

My noble and learned friend, Lord Morris, who is unable to be present to-day, has asked me to say that he entirely concurs in the judgment your Lordships are about to pronounce.

Ordered, That the said Interlocutors complained of in the said appeal be reversed: And it is hereby declared that the said appellants are entitled to a decree reducing and setting aside the Orders of the Scottish Universities Commissioners, constituted under sect. 11 *of the Universities (Scotland) Act,* 1889, *of the* 21*st of March and the* 10*th of April,* 1890. *Further Ordered, That the cause be remitted back to the Second Division of the Court of Session, with directions to pronounce decree to that effect, and to dispose of the conclusions of the summons with respect to the documents first, second, and third, called for and sought to be reduced. Further Ordered, That the said respondents do repay to the said appellants any expenses already paid to the respondents by the appellants under the interlocutors reversed: And it is further Ordered, That there be no costs of the appeal to this House.*

Lords' Journals, 8th April, 1895.

Agents for appellants: *Grahames, Currey, & Spens, for J. & F. Anderson, W.S., Edinburgh.*

Agents for respondents: *Martin & Leslie, for J. Smith Clark, S.S.C., Edinburgh.*

[HOUSE OF LORDS.]

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WALLACE AND OTHERS . . . . . APPELLANTS;

AND

GIBSON . . . . . RESPONDENT.

Principal and Surety—Guaranty—Mercantile Law (Scotland) Amendment Act, 1856, *s.* 6.

An undertaking by the defenders to give, when required, a guaranty for the repayment of money to be lent by the pursuer is a good "cautionary obligation" within the meaning of s. 6 of the Mercantile Law (Scotland) Amendment Act, 1856, and is as binding on the defenders as a direct obligation.

APPEAL against an interlocutor of the First Division of the Court of Session, Scotland, dated the 29th of June, 1894, affirming in substance the judgment of the Lord Ordinary (Wellwood) (1),

(1) His Lordship said: "The first question depends upon the construction of the 6th section of the Scottish Mercantile Law Amendment Act (19 & 20 Vict. c. 60): 'From and after the passing of this Act, all guarantees, securities, or cautionary obligations made or granted by any person for any other person, and all representations and assurances as to the character, conduct, credit, ability, trade, or dealings of any person, made or granted to the effect or for the purpose of enabling such person to obtain credit, money, goods, or postponement of payment of debt, or of any other obligation demandable from him, shall be in writing, and shall be subscribed by the person undertaking such guarantee, security, or cautionary obligation, or making such representations and assurances, or by some person duly authorized by him or them, otherwise the same shall have no effect.' It is remarkable that although more than thirty-five years have elapsed since the passing of the Act, the precise meaning of that section has never been judicially determined, although there has been a good deal of academic or juridical discussion on the subject. Two views have been taken of it, the first being that under the statute writing is essential to the constitution of the contract; and the other that writing is only required in modum probationis. If the latter is the true meaning, the words used are not happily selected. Primâ facie, the words, especially the concluding words, 'otherwise the same shall have no effect,' seem to relate to the constitution of the contract. On the other hand, it appears from the preamble to the Act that it was passed for the purpose of assimilating the law of Scotland to that of England in regard to the matters dealt with in it, and it is settled by decision in England that under the English statute writing is required in such cases, not as a solemnity, but as evidence of the con-

by which Charles T. Wallace and others, the appellants, as trustees of the late George Alston, were found liable to pay Alexander Gibson, the respondent, a sum of £7000, with interest at the rate of 7 per cent. from the 30th of June, 1891, under deduction of a sum recovered by the respondent from the sequestration of the estate of the late T. P. Alston.

The following statement of the facts is taken from the opinion of Lord Herschell L.C. :—

The appellants in this action are the trustees of George Alston, who was at the time of his death a partner in the firms of Campbell, Rivers & Co. of Glasgow, and Alstons, Scott & Co. of Colombo. The latter firm, at the time of the occurrences which have given rise to this action, consisted of the firm of Campbell, Rivers & Co. or the members thereof and two other partners. The firm of Alstons, Scott & Co. as part of their business acted as agents for persons owning estates in

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tract. The law of England as to guaranties and representations as to credit depends upon the 4th section of the Statute of Frauds and the 6th section of Lord Tenterden's Act, 9 Geo. 4, c. 14. By the former it is enacted, 'No action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof' " [these last words are not in the Scottish Act] " '*shall be in writing, and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized.*' It will be seen that the words which I have italicised are echoed in the 6th section of the Scottish Mercantile Law Amendment Act: 'Shall be in writing, subscribed by the person undertaking such guarantee,' &c., 'or by some person duly authorized by him.' In Lord Tenterden's Act, the provisions of the 4th section of the Statute of Frauds were extended to cover the case of assurances or representations on which credit is given; and that Act also required that the assurance must be in writing, signed by the party or his agent.

"I think that this Court would be slow to sustain a construction of the Mercantile Law Amendment Act which would establish a difference between the laws of the two countries instead of assimilation; and which would also, according to the opinions of many eminent judges and legal writers, introduce a radical change in the law of Scotland by making the contract of cautionry or guaranty an obligatio literarum which, according to those authorities, it was not before. I do not, however, find it necessary to express a positive opinion upon this vexed question, because I think that there is sufficient evidence in writing to establish the constitution of the contract within the meaning of the 6th section of the Mercantile Law Amendment Act."

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Ceylon, rendering or procuring for them financial assistance on the security of those estates. In the year 1878 Richard Mant, the owner of an estate called "Roeberry," owed £2000 on a first mortgage to a Mr. Hamilton, and had also obtained advances to the amount of several thousand pounds from Alstons, Scott & Co. to assist him in developing his estate. With the authority of Mr. Mant, a loan of £7000 was in the year 1879 obtained by Campbell, Rivers & Co. from Mr. J. W. Hutchison upon a first mortgage by Mant of the Roeberry estate. By this instrument of mortgage Mant became also personally bound to repay the loan. Mr. Hutchison obtained further written guaranties by Alstons, Scott & Co. and Campbell, Rivers & Co. of payment of the principal sum and interest. £2000 of the sum received from Mr. Hutchison was applied in repayment of the previous mortgage debt to Mr. Hamilton. The residue was credited to Mr. Mant in account with Alstons, Scott & Co.

In December, 1882, Mr. Hutchison intimated that he should require repayment of his loan in the following June. In consequence of this intimation Mr. John P. Alston, who was a member of the Glasgow and Colombo firms, wrote on the 4th of January, 1883, to the respondent a letter in the following terms: "My Dear Gibson,—Four years ago we arranged a loan of £7000 with Mr. J. W. Hutchison (son of the late Graham H.) on first mortgage over the estate of Roeberry in Hewa Elluja. Mr. H. has bought a property and wants the £7000 in June. The estate was then valued at £15,000, and although the coffee is worth less now the value has been kept up by large plantings of cinchona. It is, therefore, an excellent security apart from our guaranty of principal and interest. Before offering it to any one else, I think it well to place it before you as a good 7 per cent. investment (interest payable half-yearly) for three years, with six months' notice of repayment on either side. Hoping you are in good health, and wishing you and Mrs. Gibson many happy New Years together, I remain, &c., John P. Alston."

Mr. Gibson replied in the following terms: "Edinburgh, 5th January, 1883. My Dear Alston,—I have yours of yesterday, and write to say that I expect to be able to let you have the

£7000 named in June next, on the Roeberry estate, with C. R. & Co.'s guaranty of principal and interest. Not having anything coming in to me from my Ceylon estates just now, I have nothing open for investment, but by shifting investments I see my way to doing it. With the best wishes of the season to you and yours, believe me, yours very truly, Alexander Gibson."

On the 7th of May, 1883, Campbell, Rivers & Co. wrote to Mr. Gibson as follows: "Roeberry Loan, £7000. Referring to your letter of 5th January to our Mr. J. P. Alston, a power of attorney was signed by Mr. Hutchison and forwarded to Messrs. Alstons, Scott & Co. by last mail, authorizing them to transfer the security to your name. The £7000 is payable here to Mr. Hutchison on 26th June, which we hope will be convenient to you. Yours faithfully, Campbell, Rivers & Co."

On the 18th of June following the respondent transmitted to Campbell, Rivers & Co. a draft for £7000, and requested that the securities for the loan should be sent when completed to his address in Edinburgh. On the 17th of August an assignment to the respondent of Mr. Hutchison's mortgage was duly executed, but the guaranties in favour of Mr. Hutchison by the Glasgow and Ceylon firms were not assigned, nor were any similar instruments executed in favour of the respondent.

Mr. George Alston died in 1884. In 1891 the firm of Campbell, Rivers & Co. was sequestrated, and the Colombo firm of Alstons, Scott & Co. was adjudicated bankrupt. The present action was consequently raised. There was an allegation that the loan of £7000 had been procured by fraudulent representations, but this was not pressed at the hearing.

Feb. 14, 18. *A. Graham Murray*, Q.C. (with him *Alexander Ure*), (both of the Scottish Bar), for the appellants:—

The letter of the 4th of January, 1883, was not in itself a guaranty under the Scottish Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 60), s. 6. The leading provisions of the section are (1.) that every guaranty shall be in writing, and (2.) that it shall be subscribed by the person undertaking such guaranty. It is not enough to say there is "evidence in

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writing." That might be sufficient under the English Statute of Frauds, s. 4; but the provision of the Scottish Act in question is expressed in words entirely different. In *Steele* v. *M'Kinlay* (1) the Scottish Act was commented on. The respondent may have been careless, or may have been content to rely, not on a guaranty, but on a promise, and, no guaranty being asked for or given, the appellants, being trustees, must insist on the claim being legally constituted before they pay. An important reason for enforcing strict compliance with the statute of 1856 is in respect of the Septennial Limitation Act, 1695, c. 5, because if the guaranty had taken the form of a bond, under which the partners of Alstons, Scott & Co. had formally bound themselves for, and with the true debtor, such obligation would have been at the commencement of this action prescribed.

Taking the letter of the 4th of January, 1883, as a guaranty, the loan ought to have been called up at the expiration of the original term—three years. At that date the financial affairs of Ceylon were in a more flourishing condition, and there is no doubt the partners would have found the money. The opinions of the judges in the Court of Session were conflicting. The Lord Ordinary (Wellwood) held the letter of the 4th of January, 1883, was a guaranty. Lord Kinnear and Lord M'Laren were of opinion it was not a guaranty, but that the two firms were liable as principal debtors. They were supported by Lord Adam; while the Lord President (Robertson) seemed to disagree with all, except that he considered that no legally constituted guaranty was ever granted. Therefore, on these varying judgments the appellants ought to be relieved from the interlocutors appealed from.

Asher, Q.C. (of the Scottish Bar), and *Haldane*, Q.C., for the respondent:—

The two firms were principal debtors. The sum which was borrowed from the respondent was to pay a loan for which the two firms were themselves liable under their formal guaranties to Mr. Hutchison. Secondly, what was intended to be conveyed in the letter of the 4th of January, 1883, was, "If you give us the money we will see you paid." Thirdly, if a guaranty can

(1) 5 App. Cas. 754.

be gathered from the letters, why is it not a guaranty in accordance with the Mercantile Law (Scotland) Amendment Act, 1856, and the law of Scotland? Where is there anything in s. 6 of that Act in the case of letters passing between parties as to the security for a loan, and a loan being taken and money advanced on the footing that the lender has a guaranty, to prevent the transaction constituting a guaranty? See *Mallet* v. *Bateman* (1). Fourthly, the respondent lent the money on the agreement that he should have the guaranty. If the respondent had been acting at arm's-length he would have insisted on a proper security; but the parties were acting with the utmost confidence, and the respondent left it entirely to the appellants' firm to carry the transaction through on his behalf; and if there was no guaranty they failed in their duty, and are liable on that head alone.

It is enough to treat the letter of the 4th of January, 1883, as an agreement to give a good guaranty. "Cautionary obligations" include all obligations to caution. [They also referred to *Piggott* v. *Stratton* (2); *Thorne* v. *Cann* (3).]

LORD HERSCHELL L.C.:—

[His Lordship stated the facts as previously set out, and continued:—]

Two points were made on behalf of the plaintiff: first, that the two firms had, in breach of an undertaking to him, on the faith of which he had lent the money, that they would give him the guaranty of the firms for repayment of principal and interest, failed to procure such guaranty; and, secondly, that the firms, or one of them, had duly guaranteed repayment of the loan.

The Lord Ordinary decerned in favour of the plaintiff, and his interlocutor was not substantially varied on appeal to the Inner House. The grounds of judgment intimated by the learned judges were not altogether the same. Some of them were of opinion that the firm or firms of which George Alston was a member were liable, as having themselves borrowed the money

(1) L. R. 1 C. P. 163, at p. 169. (2) 1 D. F. & J. at p. 50.
(3) [1895] A. C. 11.

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from the respondent. I am unable to take this view. I do not think either the Glasgow or Colombo firm intended to borrow from the respondent, or that he intended to lend to them. The facts seem to me inconsistent with the idea that they were principals in the transaction.

It was not disputed by the appellants that the money was advanced by the respondent on the terms that its repayment should be guaranteed by the firms, or one of them, but it was contended that no such guaranty had in fact been given, and that the action therefore must fail.

It is true that no formal documents of guaranty were signed in the present case similar to those which Mr. Hutchison received when he made the original advance. But I think the letter of the 4th of January, 1883, amounted to a distinct offer of a guaranty which became operative as soon as it was accepted, and the loan which was to be the consideration for it was made. Whether by "our" guaranty Mr. J. P. Alston meant the guaranty of the Glasgow or the Colombo firm or both is immaterial. The respondent understood him to refer to Campbell, Rivers & Co., and indicated this in his letter of the 5th of January. That letter was, I think, intended as an acceptance of the offer made. The letter of Campbell, Rivers & Co. of the 7th of May following shews that it was so treated by them.

Even if the letter of the 4th of January ought not to be construed as constituting, when the offer contained in it was accepted, a binding guaranty, but ought to be regarded only as a promise if the loan was made to give a guaranty, I think that the respondent is equally entitled to succeed. It cannot be controverted that the letter amounted at the least to such a promise, and that the money was advanced on the faith of it. Why, then, should it not be obligatory? The Mercantile Law Amendment Act, which was so much relied upon by the appellants' counsel, presents no obstacle. The letter of the 4th of January, which, on the hypothesis now dealt with, was certainly a "cautionary obligation," fulfils all the requirements of the statute.

For these reasons I think the judgment appealed from should be affirmed, and the appeal dismissed with costs.

LORD WATSON:—

My Lords, I am of opinion that the interlocutor of the First Division ought to be affirmed, although I am unable to accept all the reasons which were assigned for their decision by the learned judges who constituted the majority of the Court.

The only question between the parties is, whether the late George Alston, who was one of the partners of Alstons, Scott & Co., and also of Campbell, Rivers & Co., at the time of his death in January, 1884, had undertaken, or had otherwise incurred a liability, to indemnify the respondent against any loss which he might sustain through his having lent, in June, 1883, the sum of £7000 on the real security of the estate of Roeberry, in Ceylon, and the personal security of its owner. The decision of that question appears to me to depend mainly, if not wholly, upon the legal import of two letters, dated respectively the 4th and 5th of January, 1883, which passed between John P. Alston, a partner of both the firms already mentioned, and the respondent. Apart from these writings, the material facts of the case are few, and are not in dispute.

By his letter of the 4th of January Mr. John P. Alston offered to the respondent an investment of £7000, to bear interest at the rate of 7 per cent. per annum, payable half-yearly, for three years, with six months' notice of repayment on either side. He explained that the sum of £7000 had been advanced four years previously on a mortgage of the estate of Roeberry (then valued at £15,000) by a Mr. Hutchison, who had given notice requiring repayment of the loan in June, 1883. And he added the assurance that the investment offered is "an excellent security apart from our guaranty of principal and interest."

The respondent's answer to that letter, written upon the following day, is in substance an unqualified acceptance of the offer which it conveyed to him. The respondent intimates that he sees his way to finding the money by shifting investments, and expects "to let you have the £7000 named in June next, on the Roeberry estate, with C. R. & Co.'s guaranty of principal and interest."

It may be noticed here that the repayment of Mr. Hutchison's loan had been guaranteed by Alstons, Scott & Co., who

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represented the Ceylon branch of the business; and it would appear that, in his letter of the 4th, Mr. John P. Alston intended to offer the respondent the guaranty of that firm. But the respondent, in his answer, assumed that the guaranty offered was that of Campbell, Rivers & Co., who represented the Glasgow branch. The circumstance is not material, because it is not disputed that the writer of the offer had ample authority to bind either firm and its partners; and the late George Alston was a member of both firms.

On the faith of the arrangement embodied in those letters the respondent, in June, 1883, advanced £7000. An assignation of his mortgage was subsequently executed by Mr. Hutchison in favour of the respondent, and the title-deeds of Roeberry were at the same time delivered to him.

It does not appear to me to admit of doubt that these two writings, when read together in the light of the facts which I have mentioned, constitute a concluded contract, by which one or other of the firms (it matters not which) represented by John P. Alston either gave an immediate guaranty to the respondent that his loan would be duly repaid, with interest, or undertook to give him a guaranty to that effect if and when required to do so. Either of these obligations is, in the sense of Scottish law, a "cautionary obligation," and has been validly constituted according to that law, because the letter of the 4th of January, 1883, complies with the requirements of sect. 6 of the Mercantile Law Amendment Act (19 & 20 Vict. c. 60).

In my opinion the letter of the 4th of January, according to its true import, amounts to a direct obligation of guaranty. The only reference to the subject of a guaranty is to be found in the words: "It is therefore an excellent security, apart from our guaranty." The sentence is elliptical and may be completed by adding "which we hereby offer," "or which we will give when required." I think the first of these expressions was that which the parties had in view in their offer and acceptance. It appears to me that an unqualified offer of "our guaranty" would, when accepted, be understood by business men to import a complete obligation of guaranty, and not a mere obligation to give a guaranty at some future time.

That the document was meant to convey the meaning which I have suggested, and was so understood by the acceptor, is strongly corroborated by the fact that both parties appear to have treated it, from the first, as an operative guaranty. The respondent undoubtedly did so; and on the 11th of January, 1883, Campbell, Rivers & Co., writing from Glasgow, advised Alstons, Scott & Co., in Ceylon, "that we have induced Mr. Alexander Gibson, Edinburgh, to take up this mortgage in June (when Mr. Hutchison's loan is repayable), with your guaranty of principal and interest as usual." These words naturally imply that Mr. Gibson had got the guaranty which was offered him, and during the years which elapsed between the date of the loan and the institution of this action, it never seems to have occurred to either firm, or to the respondent, that the obligation was incomplete, and that a formal guaranty was necessary.

I think it right to add that, even if it had been clear that the letter in question merely imported an understanding to give a guaranty when required, that circumstance could have made no difference in the rights and liabilities of the parties to this action. Such an undertaking, though not a direct, is a good cautionary obligation; and it would have been as binding on George Alston and his representatives as a direct obligation.

It was contended by the respondent, both here and in the Courts below, that the firm of which the late George Alston was a partner were in reality borrowers from him; and alternately, that they were liable to him, on the ground that they had failed in their duty as his agents, by neglecting to obtain from themselves a formal guaranty. The first of these contentions appears to me to be without any foundation in fact; and the second equally fails, if the letter of the 4th of January is in itself a guaranty which became complete by acceptance.

I do not think it necessary to discuss whether, under sect. 6 of the Mercantile Law Amendment Act, writing and subscription are made essential to the constitution of a cautionary obligation, or are merely required in modum probationis. In a Scottish Court, that question can never be of any except academical interest. In a foreign Court, whose curial rules differ

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from the law of Scotland, the question might become of importance.

LORD MACNAGHTEN:—

My Lords, I concur in thinking that the appeal fails. I propose to confine my observations to the letter of the 4th of January, 1883, addressed to the respondent Mr. Gibson by Mr. John P. Alston, who was a member of the Glasgow firm of Campbell, Rivers & Co., and as such also a partner in the Ceylon firm of Alstons, Scott & Co. The letter was written in the common interest of both firms, and, having regard to the evidence, it must, I think, be taken that the writer was duly authorized by both firms to subscribe it on their behalf. It seems that at the date of the letter there was a mortgage for £7000 on an estate in Ceylon called Roeberry, which was under the management of the Ceylon firm. Accompanying the mortgage were letters of guaranty by which each of the two firms made themselves answerable for the due payment of the moneys secured by the mortgage. The mortgagee, a Mr. Hutchison, had just called in the loan. The demand was inconvenient, to say the least, and the letter of the 4th of January was written with the object of inducing Mr. Gibson to take Mr. Hutchison's place. On the faith of the proposal contained in the letter of the 4th of January, and in response to Mr. John P. Alston's invitation, Mr. Gibson advanced the money required to satisfy Mr. Hutchison's claim, and thereupon in due course the mortgage was transferred to Mr. Gibson with the formalities required by the law of the island. It is conceded by the appellants that it was intended that Mr. Gibson should also have a guaranty for the due payment of the moneys secured by the mortgage. Mr. Gibson, it seems, is not in a position to claim the benefit of the guaranties which were given to Mr. Hutchison. No fresh guaranty was given to Mr. Gibson on the occasion of his advance, and the result is that Mr. Gibson obtained no legal guaranty for the due payment of the moneys secured by the mortgage unless the letter of the 4th of January, 1883, is in itself a guaranty which satisfies the requirements of the Scottish Mercantile Law Amendment Act.

It is contended on behalf of the appellants that that letter cannot be construed as a guaranty, and that if anything approaching a guaranty is to be found in it, there is at any rate nothing more than a promise to give a guaranty at some future time if and when required.

I agree with the Lord Ordinary in thinking that under the circumstances that letter is a guaranty which satisfies the requirements of the Scottish Mercantile Law Amendment Act. The letter is not as well expressed or as explicit as it might have been, but the meaning, I think, is plain enough. "The estate," it says, "is an excellent security apart from our guaranty of principal and interest." That can only mean, It is an excellent security without taking into account our guaranty which goes with the mortgage. Then the writer says, "Before offering it to any one else I think it well to place it before you as a good 7 per cent. investment." That can only mean, We offer you the security with our guaranty included. It has never even been suggested that the object of the writer was to get the mortgage accepted without a guaranty. That would have been an absurd proposal to make to a business man. It would have involved an investigation into the sufficiency of the mortgage, which probably was the last thing the writer of the letter of the 4th of January desired. Now, if the meaning of the letter is that attributed to it by the Lord Ordinary, and I do not think that it really admits of any other construction, it seems to me that as soon as Mr. Gibson advanced the money required to take up the mortgage the proposal contained in the letter became a binding contract, and the guaranty offered by the letter became at once operative and effectual.

It appears from the correspondence in evidence that both parties at the time understood the letter of the 4th of January in the sense attributed to it by the Lord Ordinary. Mr. Gibson writes on the next day and says: "I expect to be able to let you have the £7000 named in June next on the Roeberry estate with C. R. & Co.'s guaranty of principal and interest." It is quite plain that he thought that he was doing nothing more than intimating that he hoped to avail himself of the offer as made to him. They acquiesce in his construction of their

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proposal. They make no comment or reply of any sort. Then a few days afterwards, on the 11th of January, 1883, Campbell, Rivers & Co., writing to Alstons, Scott & Co., say: "We have induced Mr. Alexander Gibson to take up this mortgage in June when Mr. Hutchison's loan is repayable with your guaranty of principal and interest as usual." How had they induced him to take up the mortgage with the guaranty? The only inducement was the proposal contained in the letter of the 4th of January.

For these reasons I think the offer contained in the letter of the 4th of January accepted and acted upon by Mr. Gibson became a binding guaranty on one or other or both of the two firms of Campbell, Rivers & Co. and Alstons, Scott & Co. (for the purpose of this case it matters not which), and I concur in thinking that the appeal ought to be dismissed.

LORD MORRIS:—

My Lords, in my opinion the letters of the 4th and 5th of January, 1883, read by the light of the letter of the 11th of January, 1883, from the Glasgow firm to the Ceylon firm sufficiently disclose an obligation and constitute an effectual guaranty by one or other of the firms to Alexander Gibson, and consequently the interlocutors appealed from should be affirmed.

LORD WATSON:—

My Lords, I am requested to read the following judgment by my noble and learned friend

LORD SHAND:—

My Lords, I am also of opinion that the appeal in this case ought to be refused, although I am unable to adopt certain of the grounds of judgment of the learned judges in the Court of Session.

It seems to me, in the first place, that the defenders were not principals in the transaction into which the pursuer entered, and that they cannot be held liable in repayment of the loan as having been themselves borrowers. They were no doubt deeply interested in the money being obtained, for they were in

the management of the estate of Roeberry, and themselves considerably in advance to the owner. It was of consequence to them that Mr. Hutchison's loan should be taken over by another lender, not only because of the advances they had already made, but because they had the prospect of continuing to act as agents of the property, or rather of Mr. Mant, the owner, with the profits or commission which resulted from that relation. In the same way, it is often greatly to the advantage of a banker that his customer should be able, with his assistance it may be, to get advances from third parties, of which the bank obtains the benefit indirectly in the reduction of a debt due to them, but without incurring liability as borrowers. The principles which regulate such cases and which I think apply to this case, will be found stated in the case of *Gibbs* v. *British Linen Co.* (1) and the cases of *Eyre* v. *Burmester* there cited. But I cannot find anything, either in the relations between the parties or in the nature of the particular transaction here in question, which made the firm of Campbell, Rivers & Co. principals. On the contrary, it seems to me that they made their position quite clear by Mr. Alston's letter of the 4th of January, 1883, containing the proposal for the advance. The proposal there made is for a loan, or assignment of an existing loan or mortgage over the estate of Roeberry, which distinctly indicates that the owner of that estate was the borrower; and the words "apart from our guaranty of principal and interest" appear to me to make it clear that the firm were not themselves to be the borrowers, but were to be guarantors that the borrower should repay the loan and interest. The subsidiary liability thus expressed, I think, excludes the idea of primary liability as principal obligants. And Mr. Gibson's answer of the 5th of January shews that he regarded the firm as guarantors and not as principals, and his evidence, when examined as a witness, confirms that view.

Again, I have great difficulty in holding that either of the firms of which Mr. John P. Alston was a partner granted any guaranty for the repayment of the advance. I am unable to find in the terms of the letters of the 4th and 5th of January, and the 7th of May, 1883, relied on by the pursuer's counsel, words

(1) June 23, 1875; 4 Court Sess. Cas. 4th Series (Rettie), 630.

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which I can say amount to a direct guaranty, express or implied, as then given by either of the firms. The letter of the 4th of January is a proposal or offer to give a guaranty should the transaction go on, but not the granting of a guaranty. The terms used are: "It is therefore an excellent security apart from our guaranty of principal and interest." It is said that there is to be added by implication some such words as these: "which (guaranty) we hereby give in the event of your making the advance." It appears to me that there is nothing in the letter or in the nature of the transaction to warrant the addition of any such words, which would be the unusual course of granting (as it were by anticipation) of a de presente guaranty, to take effect in the event of the answer being favourable. I can see no good reason for holding such an addition to the language, by implication, in a letter merely presenting the proposal for an advance to Mr. Gibson for his consideration. The letter would, I think, more readily bear the construction that the pursuer would get the benefit of the existing mortgage and guaranty in favour of Mr. Hutchison by assignation from him. Such an assignation, at least as regards the guaranty, would, however, be a transaction of an unusual nature, and the very general terms used seem to me rather to point to the discharge of the existing security, and particularly of the existing guaranties, and the granting of a new mortgage and guaranty directly in the pursuer's favour. And it is clear that this was what Mr. Alston's firm intended, for in their letter of the 11th of January to their foreign house, in which they write to say they have induced Mr. Gibson to advance the money, they say: "We presume that we will get the mortgage discharged by Mr. Hutchison when the money is paid, and give Mr. Gibson an obligation to hand him a new mortgage as soon as possible." In the same letter they say that Mr. Gibson is to take up the mortgage "with your guaranty of principal and interest as usual," which, I think, clearly means that a new guaranty is to be given as usual in other cases.

But on other grounds I am satisfied that the pursuer is entitled to succeed in the action. Mr. Alston's letter of the 4th of January cannot, in my opinion, for the reasons I have now

stated, be regarded as in itself a guaranty. It is, however, a distinct offer to give a guaranty should Mr. Gibson agree to advance the money. I cannot attach any other meaning to the words (following the recommendation of the security as an excellent one) "apart from our guaranty of principal and interest." Mr. Gibson clearly acted in that view when, in his reply, he stated that he expected to be able to make the advance on the Roeberry estate "with Campbell, Rivers & Co.'s guaranty of principal and interest." The terms of these letters plainly amount to the offer of a guaranty, and a statement that if the advance is made it will be on the faith of such a guaranty to be given.

The money having been advanced on this promise, as appears from Mr. Gibson's letter of the 7th of May, the offer of Mr. Alston, on behalf of his firm, became an obligation which the firm was bound to fulfil by granting their guaranty. A question has been raised as to whether the guaranty was to be granted by the Glasgow firm of Campbell, Rivers & Co., or the foreign house of Alstons, Scott & Co., or by both of these firms. It appears to me, having in view the terms of the pursuer's letter of the 5th of January, that the guaranty stipulated for by him was that of the Glasgow firm; but the point is of no consequence, because Mr. Alston, whose representatives are the defenders in this action, was a member of both firms. The correspondence, then, amounts to an obligation in writing that the firm would grant a guaranty for the payment of the principal and interest to become due under the mortgage. I can see no reason to doubt that an obligation so constituted is effectual under the statute. It may be, looking at the matter critically, that the proper form of action would be to have the defenders in the first instance ordained to procure and deliver to the pursuer the guaranty of the firm. If there be no defence to that demand, the pursuer is entitled to succeed in his present claim for fulfilment of the guaranty by payment of the money which cannot now be recovered either from the principal obligant or the property of Roeberry; and, in substance, that is really the claim which is now made, and to which effect can therefore be given in the present action.

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Apart from this ground, however, I am further of opinion that, as the result of the correspondence and the relations between the parties, the Glasgow firm undertook as agents for the pursuer that the securities, including under that term the guaranty offered, and for which the pursuer stipulated, should be procured or granted, and handed to him, or held by them on his behalf. There was no suggestion that the pursuer should employ any law agent in the matter. His sole agents were the Glasgow firm, and I am satisfied on the correspondence that they led him to understand and believe that they would see to the completion of the security in all its particulars by obtaining a proper mortgage, and by granting the guaranty which they undertook to give, but which they failed to grant as they were bound to do.

On this ground, also, I think the pursuer's claim is well founded. In this view the claim would be one of damages, but the damage would be the amount claimed in the action, namely, the sum lent, and which cannot now be otherwise recovered.

On these grounds I agree with your Lordships in thinking that the appeal on the part of the defenders ought to be refused.

Interlocutors appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 19th March, 1895.

Agents for appellants: *Grahames, Currey, & Spens, for Mackenzie, Gardner, & Alexander, Glasgow, and F. J. Martin, W.S., Edinburgh.*

Agents for respondent: *Faithfull & Owen, for Menzies, Black & Menzies, W.S., Edinburgh.*

[HOUSE OF LORDS.]

BIRKETT OR KELSALL OR ELIOTT . . APPELLANT;

AND

PURDOM . . . . . RESPONDENT.

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1895
May 7.

Husband and Wife—Marriage Contract—Right of Husband's Creditors.

By ante-nuptial contract of marriage the husband bound himself, his heirs, executors, and representatives whomsoever, to pay to the wife an annuity of £1000 "to be applied by her towards the expenses of my household and establishment, and that during all the days of my life." He secured the annuity on heritable property, and declared it to be his wife's separate estate free of the jus mariti :—

Held, that the application of the annuity was for the husband's own benefit, and that the wife was not entitled to the payment of it as against his creditors.

APPEAL against a judgment of the First Division of the Court of Session, Scotland.

The appellant was the wife of Sir William F. A. Eliott, and the respondent was the trustee of Sir William F. A. Eliott's estate. The former claimed to be paid an annuity secured by her ante-nuptial contract of marriage dated the 24th of March, 1879. The contract contained the following provision :—

"I, the said Sir W. F. A. Eliott, in terms of the said agreement and in contemplation of our said marriage, do hereby bind and oblige myself and my heirs, executors and representatives whomsoever to pay to" (the appellant) "to be applied by her towards the expenses of my household and establishment, and that during all the days of my life an annuity or yearly sum of £1000 sterling free of all burdens and deductions whatsoever" quarterly, "and in security of the personal obligation before written I dispone to" (the appellant) "heritably All and Whole the lands and barony of Stobs and others," &c.: "and that in real security to" (the appellant) "of the foresaid annuity." "And I assign the rents so far as necessary for satisfying the said annuity" "and I assign the writs": "Moreover I . . . do hereby renounce and discharge my jus mariti and right of administration of and in relation to the estate and effects now

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belonging" . . . to (the appellant) "including the foresaid annuity payable to her during my lifetime, declaring that the same shall be and remain a separate estate in her person free of any right or claim on my part whatsoever."

In May, 1886, Sir William F. A. Eliott executed a trust-deed in favour of his creditors. The annuity was paid until Martinmas, 1887, and from thence to 1889 in a reduced degree, when payment ceased, the trustee declaring the debtor's whole means were insufficient to pay his creditors. In 1893 the appellant raised this action, with the concurrence of her husband, demanding payment of the arrears of annuity.

On the 7th of July, 1894, the First Division, affirming the decision of the Lord Ordinary, assoilzied the respondent from the conclusions of the action (1).

1895. May 7. *A. Graham Murray*, Q.C. (of the Scottish Bar), and *Haldane*, Q.C., for the appellant:—

The judges of the Court of Session rejected the claim on different, and inconsistent, grounds. The bond of annuity created a beneficial provision for the suitable maintenance of the intended wife as the consideration of the marriage. Secondly, reading the latter part of the deed, the intention was to secure a separate estate in her person free from all right of her husband or his creditors. It could be, at her instance, enforced against him; and his creditors have no greater right. If the words "To be applied towards the expenses of my household" had been omitted the appellant would undoubtedly be an onerous creditor. At most they contain an obligation to spend in her discretion such amount as may be proper on the expenses of the household, leaving her at liberty to apply the balance for her own use. The broad view of the case is that the appellant, who was about to enter into this her second marriage, was not willing to give up the consideration for the marriage without obtaining something in return; and it must be held that the annuity was a subject-matter in which she had a residuary beneficial interest: see Fraser on Husband and Wife, 2nd ed. p. 540: *Dickson* v. *Braidfoot* (2).

(1) 21 Court Sess. Cas. 4th Series (Rettie), 955. (2) Mor. Dic. 10,396.

The Lord Advocate (*Balfour*, Q.C.), and *Charles C. Maconochie* (of the Scottish Bar), for the respondent, were not heard.

LORD HERSCHELL L.C.:—

The sole question in this case is whether the appellant, the wife of Sir William Eliott of Stobs, is entitled to require the payment to her of an annuity of £1000 from the respondent, which depends upon the question whether she has an onerous right in competition with the creditors of Sir William Eliott.

The claim is founded on a bond of annuity of the 24th of March, 1879, executed by Sir William Eliott in contemplation of his marriage with the appellant. By that instrument Sir William Eliott bound himself to pay to the appellant "to be applied by her towards the expenses of my household and establishment, and that during all the days of my life an annuity or yearly sum of £1000 sterling free of all burdens and deductions whatsoever"; and he gave her in respect of that annuity a real security. If the words "to be applied by her towards the expenses of my household and establishment" had been omitted from the instrument, there can be no doubt that she would have obtained under it an onerous right to the payment of that annuity, and that she would have a right to the real security in respect of it; but the question now arises, the respondent trustee not being in a position to pay the demands of the creditors of Sir William Eliott, can she claim to be paid this annuity of £1000?

It is not disputed that if the wife is to receive this fund merely to be administered by her for the benefit of her husband, if she is properly to be regarded as not receiving it for her own benefit but as bound to expend it in his interest in terms of the deed, then an arrangement of that sort by which a person transfers to another a portion of his property with the obligation to expend it for his benefit, cannot stand against the creditors of the person who seeks to make such an arrangement. I confess that I find it impossible to construe the words used in any other than their ordinary sense. She is to receive this annuity during all the days of his life. She can apply it only to one purpose, and that is towards the expenses of his household

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and establishment. If circumstances should arise leading the wife to seek a separate residence, she would not be entitled to expend the money upon that household and establishment. The terms of the instrument compel the expenditure of it only upon the household and establishment of the husband. Of course circumstances might arise in which she could apply to the Court to make a provision for her, but if that were done it would be a provision not under the terms of the deed but as the result of an application to the Court.

If the matter stood there I should find it difficult to conceive of an argument in support of the proposition that this is other than an undertaking to pay a certain sum of money to the wife which she is to have the administration of (but the administration only) for the husband primarily in paying the expenses of his household and establishment. But the deed contains this provision: Sir William Eliott renounces and discharges his "jus mariti and right of administration of and in relation to the estate and effects now belonging or which may pertain and belong to the said Mrs. Hannah Grissell Birkett or Kelsall, including the aforesaid annuity payable to her during my lifetime, declaring that the same shall be and remain a separate estate in her person, free of any right or claim on" his "part whatsoever." That is a clause not only applicable to this provision; it applies generally to any estate and effects belonging to the lady who was marrying Sir William Eliott, but no doubt in terms it includes "the aforesaid annuity."

It is, I admit, difficult to say exactly what construction is to be put upon those words, which have no very definite or technical meaning; but this, at least, I am satisfied of, that it is impossible to construe them as wiping out, annulling, or rendering of no effect, that limitation upon the application of the money which is expressly provided for by the earlier part of the deed. This being so, it is unnecessary to dwell upon those words. Unless such a meaning and effect can be given to them they are immaterial for the purposes of this case.

Under these circumstances, my Lords, I think your Lordships have no alternative but to accept the view which has been taken in the Court below, and to dismiss this appeal with costs.

LORD WATSON :—

I have come without much hesitation to the same conclusion as the Lord Chancellor.

If the construction of the first clause be that which has been attached to it by the Courts below, then, I think, it is clear that even the expressions which follow it, "a separate estate in her person free of any right or claim" and so forth, would be quite inofficious to cut down the meaning of the provision sought to be constituted by the original words. I find it impossible to construe the first and leading clause otherwise than as giving to the lady who was about to become Sir William Eliott's wife an allowance of £1000 a year for the payment of his household bills. It is neither more nor less than that. The money is not given her for her own benefit—it is not given her to defray her own expenses; it is given her for the purpose of defraying expenses for which he was responsible and which were to be incurred by him, or on his credit. Now, in those circumstances, I think the provision is one by which the husband settles his own money for the purpose of paying his own debts as they arise. His wife was in the position of trustee or administrator (it matters not to inquire very closely which of those two positions she occupies). She had no beneficial interest of her own which could support the onerosity of this stipulation in a question with creditors of her husband.

LORDS ASHBOURNE and MACNAGHTEN concurred.

LORD SHAND :—

I agree with the Lord Chancellor and with my noble and learned friend Lord Watson in holding that the clause in the second part of this deed which has been founded upon does not destroy or limit the effect of the earlier words with regard to the purpose for which this annuity was given.

Taking it, then, as a provision of £1000 a year to be applied by the wife towards the expenses of her husband's household and establishment, that is really the administration of the estate for the husband's own benefit. It is no doubt true as has been

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pressed upon your Lordships, that the wife would get some incidental advantage from that administration; but primarily and substantially it is an administration for his benefit. It is a provision which he makes for himself to operate during his own life and to cease at his death; and being so it is clear, according to the law of Scotland, that it is inoperative in a question with creditors where a deficiency of funds arises as in this case.

Therefore, my Lords, I concur with your Lordships in thinking that the decision of the Lord Ordinary and of the Inner House must be adhered to.

Interlocutors appealed from affirmed and the appeal dismissed with costs.

Lords' Journals, 7th May, 1895.

Agents for appellant: *Loch & Co., for Dundas & Wilson, C.S., Edinburgh.*

Agents for respondent: *Neish, Howell & Macfarlane, for Maconochie & Hare, W.S., Edinburgh.*

[HOUSE OF LORDS.]

H. L. (Sc.) 1895 *May* 13.

THE LORD PROVOST, &c., OF GLASGOW AND ANOTHER . . . . . } APPELLANTS;

AND

THE GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY AND ANOTHER . } RESPONDENTS.

Waterworks—Power to break up Streets—Land not dedicated to Public Use—Waterworks Clauses Act, 1847 (10 & 11 *Vict.* c. 17), *ss.* 28, 29.

By sect. 28 of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), it is provided that the undertakers may open and break up the soil and pavement of the several streets and bridges within the limits of the special Act, and may open and break up any sewers, drains, or tunnels within or under such streets and bridges, and lay down and place within the same limits pipes, &c. By sect. 29 it is provided that nothing therein contained shall authorize the undertakers to lay down or place any pipe . . . . or

other work in any land not dedicated to public use, without the consent of the owners or occupiers thereof. . . .:—

Held, that the undertakers were not authorized by sect. 28 to cut through plates lying on the top of a girder railway bridge carrying a public road for the purpose of suspending their pipes to the girders.

APPEAL from a judgment of certain interlocutors of the Second Division of the Court of Session in an action raised by the Glasgow and South-Western Railway Company, the respondents, against the provost and magistrates of Glasgow, the appellants.

The respondents were the owners of two bridges carrying a road, called Helen Street, over the main line of the respondents' railway and a branch line diverging from the main line. These bridges were built on land belonging to the respondents and maintained by them, and were their exclusive property. Some years ago Helen Street was formed by the respondents and others as a private road. In 1886, by agreement with the Police Commissioners, right to use the street was given to the public.

The appellants, as Water Commissioners of Glasgow, proposed to lay, and have actually laid, an 18-inch water pipe along Helen Street and over the said bridges.

The bridge over the main line was constructed of longitudinal girders, resting on stone abutments, and joined by transverse girders, between which iron plates extended to form the floor of the bridge, on and above which the bridge was laid. The appellants proposed to open the roadway and remove the plates attached to the girders, and to suspend their water-pipe from the girders themselves under or beneath the plates.

The bridge over the branch line was constructed in the same way, but without transverse girders: between the longitudinal girders are plates are placed to form the floor of the bridge. Between the girders was simply air space. The appellants desired to remove those plates, and suspend the pipe from the girders themselves underneath the plates. The appellants had, without any agreement being adjusted between them and the respondents, broken up the roadway and removed the plates over the girders on the bridges. From the girders of the bridge over the branch line they had already suspended their water-pipe; and they had cut

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a hole into the stone abutments of the bridge over the main line. They claimed the right to do this by virtue of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), ss. 28, 29 (1), and their operations had been sanctioned by two justices purporting to act under sect. 31 of the same Act.

On the 17th of July, 1894, the Second Division recalled the Lord Ordinary's interlocutor dated the 27th of April, 1894, and on the 11th of December granted interdict against the appellants (2).

1895. May 13. Sir *Richard Webster*, Q.C. (with him, *Fletcher Moulton*, Q.C.), for the appellants :—

No injunction ought to have been granted. By sect. 28 of the Waterworks Clauses Act (10 & 11 Vict. c. 17) the appellants take power to open and break up the soil and pavement of the several streets and bridges. If the space between the girders had been filled with concrete, the undertakers would have been entitled to dig into the concrete and lay their pipes therein. The right cannot depend on whether the railway company build their bridge with or without material placed between the girders. The undertakers may open and break up any sewers, drains, or

(1) Sect. 28: "The undertakers, under such superintendence as is hereinafter specified, may open and break up the soil and pavement of the several streets and bridges within the limits of the special Act, and may open and break up any sewers, drains, or tunnels within or under such streets and bridges, and lay down and place within the same limits, pipes, conduits, service pipes, and other works and engines, and from time to time repair, alter, or remove the same, and for the purposes aforesaid, remove and use all earth and materials in and under such streets and bridges, and do all other acts which the undertakers shall from time to time deem necessary for supplying water to the inhabitants of the district included within the said limits, doing as little damage as can be in the execution of the powers hereby, or by the special Act granted, and making compensation for any damage which may be done in the execution of such powers."

Sect. 29: "Provided always, that nothing herein contained shall authorize or empower the undertakers to lay down or place any pipe, conduit, service pipe, or other work in any land not dedicated to public use, without the consent of the owners and occupiers thereof, except that the undertakers at any time may enter upon and lay or place any new pipe in the place of an existing pipe in any land wherein any pipe hath been already lawfully laid down or placed in pursuance of this or the special Act or any other Act of Parliament, and may repair or alter any pipe so laid down."

(2) 21 Court Sess. Cas. 4th Series (Rettie), 1033.

tunnels within and under such streets or bridges. Again, they may remove and use all earth and material—that means, make a hole if necessary. The roadway in question is dedicated to the public use. Again, the appellants may justify what they have done under the powers conferred by sect. 29. Suppose a tunnel running along a street. The undertakers could break into that tunnel, lay or affix their pipe, and restore the crown of the tunnel. It is consistent with the public interest that the widest construction should be given to the Act which does not interfere with the private right of the railway company.

The Lord Advocate (*Balfour*, Q.C.), and *A. Graham Murray*, Q.C. (of the Scottish Bar), for the respondents, were not heard.

LORD HERSCHELL L.C. :—

The question raised in this case is as to whether the appellants, as Water Commissioners of Glasgow, are entitled to carry water-pipes through the bridge, which the respondents have erected to carry a street over their railway. The bridge is constructed of iron, and the roadway is laid upon metal plates, which are supported by iron girders. The water-pipe is carried through holes bored in the stone abutments, and attached and fastened to the girders which support the bridge. They are longitudinal girders, and above them are metal plates upon which the roadway is laid, but there is not sufficient space for an 18-inch pipe to be laid between the top of the road and the plates, so it is proposed to fasten the pipe to the cross girders.

The question is whether this is sanctioned by sect. 28 of the Waterworks Clauses Act of 1847. If the language clearly authorized this, I should not suppose it to be unreasonable. But, my Lords, my difficulty is that I cannot find any language in the clause which will justify the appellants in laying or fastening a water-pipe in the manner proposed. Sect. 28, in the first place, says that "the undertakers may open and break up the soil and pavement of the several streets and bridges within the limits" of their special Act. Anything that properly comes within the terms "breaking up the soil and pavement," giving to those terms the broadest and least technical signification, I

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should say was within the purview of the Act. The case was put of a road made from ordinary paving materials—say a macadamized road which rested on a bed of concrete—and the question was asked whether the concrete would be part of the "soil and pavement" within the meaning of the section. I should be quite prepared to say that it would be. I think it was not intended to limit the powers so strictly by the use of the words "soil and pavement."

But, upon the other hand, it is impossible to say that what is being done in this case comes within the meaning of the words of this section. What the undertakers are doing here is interfering with the structure of the bridge itself, not breaking up the soil and pavement of the bridge, but actually piercing the masonry of the bridge; and it seems to me that if it had been intended to give power to do that, the language used by the Legislature would have been entirely different. The authority to break up the soil and pavement given in this section points, in my mind, to an altogether different operation.

My Lords, that would be enough to dispose of this case; but I am unable to see that what has been done with the pipe underneath the bridge comes within any part of the language used in this section. There certainly has been no opening and breaking up of "any sewers, drains, or tunnels within or under such streets and bridges." That refers to a case where some existing work has already been constructed under the highway, and it provides that notwithstanding that the land in or under the highway has been taken for that purpose, there is nevertheless still to be power to lay a water-pipe.

Now, so far I confess I think it was felt by the learned counsel for the appellants that there would be great difficulty in bringing the case within the section; but he relied upon the words which follow: "And for the purposes aforesaid remove and use all earth and materials in and under such streets and bridges, and do all other acts which the undertakers shall from time to time deem necessary for supplying water." I do not think it is possible to give to the words I have just read the very wide construction which has been contended for by the learned counsel for the appellants. I think they must

be read in connection with the earlier part of the section, and as ancillary to it. It was not intended to give to the undertakers an independent power to do what they pleased with the bridges, the soil and pavement of which, and that alone, they have been authorized to break up; but it was only intended in cases where they were conducting operations authorized by the earlier part of the section to give them power to "remove and use all earth and materials in and under" the streets which had been disturbed for the purpose of the authorized operations.

I own to my mind the 29th section also presents very serious difficulties. The 29th section is a proviso upon the 28th, that is to say (for such is the true effect of the proviso), notwithstanding that the case may be brought within the words of the 28th section, no act on the part of the undertakers shall be authorized save subject to the provisions of the proviso. The proviso is in these terms: "Provided always that nothing herein contained shall authorize or empower the undertakers to lay down or place any pipe, conduit, service-pipe, or other work in any land not dedicated to public use without the consent of the owners and occupiers thereof." I have difficulty in seeing how it is possible to say that this pipe underneath the bridge was placed in land dedicated to the public use. Even if it be conceded (as it may be) that the whole of that land which was occupied by, or the air above the land which was occupied by, the structure of the bridge, is to be regarded as land dedicated to the public (which I think may well be the case), yet anything which is entirely outside any part of that structure appears to me not to be land dedicated to the public. I do not see how it can be said to be dedicated to the public. The suggestion that because there are several of these girders, each of them coming down some distance below the roadway of the bridge, and because each of them forms a part of the structure, the open space between them, which is entirely unconnected with them, which is no more connected with them than it is connected with the air below, is a portion of the bridge, or becomes part of the bridge, or becomes dedicated to the public, seems to me a proposition which it is very difficult to follow.

Therefore, in addition to the difficulty arising upon the 28th

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section, the 29th section also, to my mind, presents very considerable difficulty. I am unable to differ from the view which was taken by the Court below, and therefore I think the judgment appealed from must be affirmed, and I move your Lordships accordingly.

LORD WATSON:—

I am of the same opinion. I think the appellants have failed to shew that the works which they have executed are warranted either by the 28th or the 29th section of the Waterworks Clauses Act.

With regard to the later section, which provides that a pipe shall not be placed in any land not dedicated to the public, I am quite aware, and it is obvious, that questions may arise where land is burdened with the support of a public roadway, how far that burden extends, and how far an undertaking incumbent upon the proprietor of the land to give support to the roadway along the surface implies dedication to the public of his land for that purpose to a particular depth. But it is not necessary to consider a speculative question of that kind in this case, because the limits of the public right here are very clearly defined. Of course on the surface of the road there must be a certain extent of air space which is dedicated to the public with the use of the road; but with the lower part of each girder the interest of the public, in my opinion, entirely ceases. Whatever is below the lower part of the archway of the bridge, below the girder and altogether outside of the bridge, is not in my opinion dedicated to the public, and is not land or a hereditament in which the public have the least interest.

Then, with regard to the 28th section, it is unnecessary for me to comment upon it at any length after the observations which have been made by my noble and learned friend the Lord Chancellor, in which I entirely concur. But I take leave to observe that all the powers given by that clause appear to me to be very intimately connected the one with the other. I think the first power given affords the keynote to all the rest, or, in other words, all the powers that follow the first power conferred by the clause are ancillary to it. The first part of the

clause give power "to open and break up the soil and pavement of the several streets and bridges." That is an operation impracticable in the case of the roadway along the bridge in question, and it is not suggested that the power has been exercised, or can be exercised. Then follows the power to lay down and place pipes. Nothing can be more clear in regard to these powers than this: that the purpose of opening and breaking up the soil under the first of them is simply to form a hole or trench in which the pipe can be laid. Then comes the third power, of which a great deal was said in the very able argument of Sir Richard Webster: "and may open and break up any sewers, drains, or tunnels within or under such streets and bridges," and so forth. That is not a general power to roam over the streets and break open sewers, drains, and tunnels. It is a power meant to be exercised in cases where the promoters of an undertaking, having opened or broken up a street under the first power given by the clause, meet with an obstruction to their work in the shape of tunnels, drains, or sewers which have been previously constructed. But from beginning to end of the clause there is no power given to go beyond the soil and pavement of the bridge. In this case, as I have said before, there has been no operation attempted upon the soil or pavement of the bridge, but there have been operations conducted involving very serious interference with the structure of the bridge, which are unnoticed and unwarranted by the clause.

LORD ASHBOURNE:—

I quite concur.

LORD SHAND:—

The operations of the appellants in this case for the public benefit have apparently been carried on so as to be neither injurious to the stability of the bridge itself, nor, so far as I can see, to the use of the railway in any way; and I should willingly, if I could, have adopted the view which Lord Low took in the first instance. But, having carefully considered the limited terms and expressions which are used in the statute, I am of opinion with your Lordships, for the reasons which have been

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given, and on both the grounds stated by my noble and learned friends the Lord Chancellor and Lord Watson, that the interlocutors appealed from must be affirmed.

Interlocutors appealed from affirmed and appeal dismissed with costs.

Lords' Journals, 13th May, 1895.

Agents for appellants: *Martin & Leslie for Campbell & Smith, Edinburgh.*

Agents for respondents: *Grahames, Currey & Spens for Hope, Todd & Kirk, Glasgow.*

[HOUSE OF LORDS.]

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OSGOOD HANBURY MACKENZIE . . . APPELLANT;

AND

M. A. EDWARDS-MOSS OR MACKENZIE . RESPONDENT.

Divorce—Desertion—Reasonable Cause.

By the Scots Act, 1573, c. 55, it is enacted in effect that it shall be sufficient cause of divorce if either spouse leave the other without reasonable cause and remain maliciously absent for four years.

In an action by a husband against his wife for divorce on the ground of desertion for the statutory period, it appeared that she had left him because of conduct on his part causing her mental distress sufficient to interfere with her restoration to health, and because of menaces by him sufficient to create in her a well-founded apprehension of physical restraint, and culminating in an act of violence against her person:—

Held, that she had reasonable cause for leaving her husband's house, and for declining to return to it, and that there was a good defence to the action.

Whether in an action for adherence by a husband, misconduct on his part short of cruelty or other matrimonial offence may be a ground for refusing relief, *quære.*

APPEAL from an interlocutor of the Second Division of the Court of Session, Scotland.

The appellant was Osgood Hanbury Mackenzie, and the respondent was his wife, Minna Amy Edwards-Moss or Mackenzie.

The following statement of the facts is taken from the opinion of Lord Watson:—

The appellant, a landed proprietor in the west of Ross-shire,

and domiciled there, was married in June, 1877, to the respondent, who was an English lady. One child, a daughter, was born of the marriage on the 1st of March, 1879. On the 4th of August, 1880, the respondent left the appellant's house, and has ever since declined to resume cohabitation.

The present action was brought by the appellant in November, 1891, under the provisions of the old Scots Act, 1573, c. 55 (1), as modified by the 11th section of the Conjugal Rights (Scotland) Amendment Act, 1861 (2). It concluded (first) for declarator that the respondent had been guilty of wilful and malicious non-adherence to and desertion of the respondent for the statutory period of four years; (secondly) for decree of divorce a vinculo;

(1) "That quhatsumeuer persoun or persounis Joynit in lauchfull Matrimonie husband or wife diuertis fra vtheris companie without ane ressonabill caus alledgeit or deducit befoir ane Judge and remainis in thair malicious obstinacie be the space of four yeiris and in the meane time refusis all preuie admonitiounis. The husband of the wife or the wife of the husband for dew adherence That than the husband or the wife sall call and persew the obstinate persoun offendar befoir the Judge Ordinar for adherence. And in case na sufficient causis be alledgeit quhairfoir na adherence suld be bot that the sentence procedis aganis the offendar refusand to obey the samin. The husband or the wife sall mene thameselfis to the Superiour Magistrate videlicet the Lordis of Sessioun and sall obtene letteris in the four Formes conforme to the sentence of adherence Quhilk charge being cõtempnit ẗ therefore being denuncit Rebell and put to the horne Than the husband or the wife to sute the spiritual Jurisdictioun and power and require the lauchfull Archibischop, Bischop or Superintendent of the countrie quhair the offendar remanis to direct preuie admonitiounis to the said offendar admonisching him or hir as befoir for adherence. Quhilkis admonitiounis gif he or scho contemptcouslie disobeyis, That Archibischop, Bischop or Superintendent To direct charges to the minister of þat Parochin quhair the offendar remanis or in case thair be nane or that the minister will not execute to the minister of the nixt adiacent Kirk thairto Quha sall proceid aganis the said offendar with publict admonitiounis and gif thay be contempnit to the sentence of Excommunicatioun. Quhilk anis being pronuncit the malicious and obstinat defectioun of the partie offendar to be ane sufficient caus of diuorse and the said partie offendar to tyne and lois thair Tocher Et donationes propter Nuptias."

(2) Sect. 11 of the Conjugal Rights (Scotland) Amendment Act, 1861 (24 & 25 Vict. c. 86), provides: "It shall not be necessary, prior to any action for divorce, to institute against the defender any action of adherence, nor to charge the defender to adhere to the pursuer, nor to denounce the defender, nor to apply to the presbytery of the bounds, or any other judicature, to admonish the defender to adhere."

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and (thirdly) for declarator to the effect that the appellant was free to marry again, and that the respondent had forfeited all the privileges of a lawful wife, including her claims as a widow, whether legal or conventional.

A proof, both oral and documentary and extending to nearly 1000 pages, was led by both parties, which gave a minute account of their life from the date of their marriage until the time of their separation in August, 1880. The substance of this evidence is fully stated in the opinions of their Lordships.

The Lord Ordinary (Wellwood) assoilzied the respondent. On a reclaiming note his decision was adhered to by a majority of the Second Division (1), consisting of the Lord Justice Clerk, Lord Young, and Lord Trayner. Lord Rutherfurd Clark dissented, being of opinion that the respondent had failed to prove facts and circumstances which would have entitled her to a judicial separation; and that the appellant was therefore entitled to decree.

Feb. 28; March 1, 5, 7, 12. *Asher*, Q.C., and *A. Graham Murray*, Q.C. (with them *Cullen*), (all of the Scottish Bar), for the appellant:—

In an action for divorce by reason of desertion no preliminary action for adherence need now be raised; Conjugal Rights (Scotland) Act, 1861, s. 11: *M'Cullum* v. *M'Cullum* (2). The remedy given by the Act of 1573 remains, and the nature of the defences which would succeed as an answer to an action of divorce are the same as would form a good answer to a judicial demand for adherence. Where, therefore, a wife's defence to an action of divorce rests on the conduct of her husband towards her, the question is whether the conduct proved is such as would afford the wife a good defence to an action of adherence—in England an action of restitution of conjugal rights. In an action of adherence, two kinds of misconduct are recognised by the law of Scotland as releasing a spouse from the obligation of adherence, namely, adultery and sævitia. Either of these being proved, the injured spouse is entitled to obtain, in an action of separation a

(1) Dec. 21, 1892. 20 Court Sess. Cas. 4th Series (Rettie), 636.

(2) Feb. 23, 1865. 3 Court Sess. Cas. 3rd Series (Macpherson), 550.

mensâ et thoro, a decree declaring his or her right to refuse adherence. Similarly, either of these being proved by a defender in an action of adherence entitles such defender to be absolved from the conclusions of the action. The defence to this action, so far as founded on alleged cruelty or unkindness on the appellant's part, must fail, because the evidence cannot be held to prove, either in fact or law, that the appellant's conduct amounted to sævitia such as would entitle the respondent to a separation a mensâ et thoro. What happened on the 4th of August, 1880, cannot be said to be cruelty. All agree it was an isolated act. Then the nature of the matrimonial relations between them did not dispose the appellant to stretch a point to let the child accompany the respondent to England. The appellant did not intend to be unkind to the respondent. All he wanted was to rescue a screaming child. Of course, the mother did not let go of the child willingly, and her arm was slightly bruised. From beginning to end of the evidence there was no evidence of even an unkind or rough word. The separation which took place was more from what was in the respondent's mind than anything else; in fact, she had lost her regard for the appellant. What is the test of cruelty? One act of violence, occurring under circumstances which under no possibility could occur again, being merely a scuffle, and causing no reasonable apprehension of further acts, cannot be said to be cruelty. The law is clear that the test in an action for adherence and judicial separation is the same: see the Scots Act of 1573, c. 55. Absence is only to be justified by "reasonable cause": *A. B.* v. *C. D.* (1); *Chalmers* v. *Chalmers*, per the Lord President (2); Fraser on Husband and Wife (2nd ed.), 873, and the cases he cites; *Paterson* v. *Russell* (3); *Colquhoun* v. *Colquhoun* (4); *Graham* v. *Graham*, see Lord President Inglis (5); *Steuart* v. *Steuart* (6); *M'Lauchlan* v. *M'Lauchlan* (7). There is nothing in this case like *Kelly* v.

(1) Dec. 3, 1853. 16 Court Sess. Cas. 2nd Series (Dunlop), 111.

(2) March 4, 1868. 6 Court Sess. Cas. 3rd Series (Macpherson), 550.

(3) 7 Bell's Apps. 337, 363.

(4) March 7, 1804. Mor. Dict. H. & W. Appendix, p. 10.

(5) 5 Court Sess. Cas. 4th Series (Rettie), at p. 1095.

(6) June 3, 1870. 8 Court Sess. Cas. 3rd Series (Macpherson), 821.

(7) 1 Court Sess. Cas. 2nd Series (Dunlop), 294.

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Kelly (1) : see also Brown & Powles on Divorce (1889 ed.) pp. 135, 139 ; *Scott* v. *Scott* (2) ; *Lady Leckie* v. *Moir of Leckie* (3) ; *Neeld* v. *Neeld* (4) ; *Watson* v. *Watson* (5). [They also cited the following as to the father's power over children as distinguished from the mother's : Erskine, i. 6, 53 ; Fraser's Parent and Child, 68 ; *Lang* v. *Lang* (6) ; *Lilley* v. *Lilley* (7).]

The Lord Advocate (*Balfour*, Q.C.) and *Haldane*, Q.C., for the respondent, not heard.

Judgment after consideration.

1895. May 16. LORD HERSCHELL L.C. :—

The appellant seeks a divorce from his wife. He claims it upon the ground that she deserted him for four years without any reasonable cause. His claim is founded on the Divorce Act of 1573. That Act made it sufficient cause of divorce if either spouse "diuertis fra vtheris companie without ane ressonabill caus alledgeit or deducit befoir ane Judge and remanis in thair malicious obstinacie be the space of four yeiris." The remedy could, however, only be obtained by means of an action for due adherence. It was necessary that the defender should be charged to adhere, and that the spiritual jurisdiction should be invoked to admonish the defender so to do.

By the Conjugal Rights Amendment (Scotland) Act, 1861, it was enacted that "it should not be necessary, prior to any action for divorce, to institute against the defender any action of adherence, nor to charge the defender to adhere to the pursuer, nor to denounce the defender, nor to apply to the presbytery of the bounds, or any other judicature to admonish the defender to adhere." An action of divorce may therefore now be raised without any preliminary proceedings at the expiration of four years' desertion.

(1) 1869. L. R. 2 P. & M. 31.
(2) 34 L. J. (P. & M.) 23.
(3) Dec. 6, 1750. Elchies Dec. H. & W. No. 35, vol. 2, p. 193 ; 6 Pat. App. 687 ; vol. 11 H. Lords Printed Papers.
(4) 4 Hagg. Ecc. 263, 265.
(5) 17 Court Sess. Cas. 4th Series (Rettie), p. 741.
(6) 7 Court Sess. Cas. 3rd Series (Macpherson), 445.
(7) 4 Court Sess. Cas. 4th Series (Rettie), 397.

It was contended on behalf of the appellant, and I think rightly, that the object of the Act of 1861 was only to simplify the procedure and not to alter the matrimonial law. It was also contended that under the law, as it existed prior to 1861 no circumstances could afford "reasonable cause" under the statute of 1573, which would not have been an answer to an action for adherence.

It is not necessary to decide the point, but I so far concur with this view, that I think if a decree of adherence had been obtained it would not have been competent for the spouse to rely on any circumstances existing prior to the action of adherence as a reasonable ground for desertion, and if for a period of four years, during which the spouses were apart, an action for adherence might at any time have been successfully maintained, I do not think it would be possible to establish that there was reasonable cause for desertion. At the same time it appears to me that it would be essential for the party suing for a divorce to shew that he or she had during that time used every reasonable endeavour to induce the other to adhere, and been ready and willing to discharge on his or her part all marital duties.

The appellant further contended that nothing could be a defence to an action for adherence which would not establish the right to a decree of separation. The only foundation for such a decree, it was said, is a matrimonial offence—adultery or sævitia; and therefore unless one or other of these could be proved, the right to a divorce by the party deserted was, after four years' desertion, inevitably established.

My Lords, I am not prepared, without further consideration, to assent to the proposition that a spouse who seeks a decree of adherence is in all cases entitled to obtain it unless a case can be established by the defender which will justify a decree of separation. It will be seen that in the view which I take, it is not necessary to determine the point in the present case, but I think it right to state the grounds upon which I desire to reserve my judgment upon it.

I admit that there is authority for the proposition contended for on behalf of the appellant, but it has never yet, so far as I

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am aware, been canvassed either in a Court of Appeal or in this House. It seems to me open to question whether the Courts ought in all cases to disregard the conduct of the party who invokes their aid in an action for adherence, and to decree it in all cases where a matrimonial offence cannot be established by the defender. It is certain that a spouse may, without having committed an offence which would justify a decree of separation, have so acted as to deserve the reprobation of all right-minded members of the community. Take the case of a husband who has heaped insults upon his wife, but has just stopped short of that which the law regards as sævitia or cruelty; can he when his own misconduct has led his wife to separate herself from him, come into Court, and avowing his misdeeds, insist that it is bound to grant him a decree of adherence?

I cannot better illustrate my meaning than by referring to the case of *Paterson* v. *Russell* (1), which was relied on by the appellant. It was determined in this House, reversing the decree of the Court of Session, that the wife was not entitled to a separation; could the husband have insisted upon a decree of adherence? Might not the Court refuse its aid to one who had so acted, and regard his conduct as a bar to his claim to relief?

It is not a motion strange to our law that the Court should refuse its aid to one who does not come into it with clean hands, and when the question arises for decision I think it may well be considered whether the Court would be bound to entertain an action, and grant relief at the suit of one whose misconduct, though falling short of a matrimonial offence, has been the primary cause of the difficulty, and has led to the refusal to adhere.

My Lords, I turn now to the facts of the present case. It is one of a painful character, and I have no desire to discuss them in greater detail than is absolutely necessary. The parties were married in June, 1877. Differences appear to have arisen between them at an early period in their married life. I need not dwell upon the cause of these differences. There were no doubt faults on both sides, but I am satisfied those of the appellant were (to say the least) quite as serious as those of the respondent.

(1) 7 Bell's Apps. 337.

On the 4th of August, 1880, the respondent left her husband's house, and has not since resided or cohabited with him. The incidents which led to this act on her part are all-important, and I pass at once to a consideration of them. There is some conflict of evidence as to the facts, but in its broad features the story told by the appellant himself does not widely differ from that of the respondent. The Lord Ordinary, who saw and heard the witnesses, accepted the respondent's story as substantially accurate, and, as regards the extent of the violence used, it is, as I shall shew, corroborated by witnesses of credit, who speak to facts about which they cannot be mistaken. It appears that the appellant on the morning in question directed that the only child of the marriage should be brought (as had been usual) to the dining-room where he was breakfasting. The infant was at that time with her mother, who was breakfasting in bed. The appellant came to the door and said: "Give up baby; I want her at once." The nurse, who entered the room about that time, said: "Oh, baby has not finished her breakfast; won't you leave her?" To which the respondent added, "If you leave her here a few minutes she will have done, and she can go." The appellant replied: "I will have her. It is nonsense. I will have her at once. Give her up." Lady Mackenzie, the appellant's mother, then came in. She took hold of one of the respondent's hands, the appellant gripped the other with considerable force, and whilst the respondent was thus held the nurse took the child away.

The appellant alleged that the violence employed by him on the occasion had been exaggerated, and sought to excuse his act as an endeavour to rescue the child from a position of peril. I concur with the Lord Ordinary in rejecting this allegation and excuse, and in the conclusion that the child was taken by force from the respondent, and that considerable violence was used. About this I think there can be no real doubt, the marks left upon the respondent's wrist by the appellant's grip were seen by Sir Kenneth and Lady Mackenzie, his brother and sister-in-law, by Sir John Moss, the respondent's brother, and by her maid, and were visible for several days.

The appellant did not use actual violence to his wife on any

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other occasion; and although the violence was considerable, it did not result in any serious consequences. Now, there are, no doubt, cases in which a single act of violence would not afford sufficient ground for a decree of separation; if the assault did not cause any serious injury, if it were the result of sudden passion, and were repented of as soon as committed, and above all, if there were no reason to anticipate its repetition, the Court might not regard it as amounting to sævitia or cruelty. On the other hand, a single act of violence has been regarded as sufficient to warrant a decree of separation, where there was reason to anticipate that it might be repeated. The occurrences of the 4th of August cannot therefore be regarded by themselves as if they constituted a solitary incident detached from all that had gone before or that followed; one is compelled to consider the previous conduct of the appellant towards his wife, and to judge what prospect was before her if she had remained an inmate of her husband's house or had consented to return and make it her home.

For a considerable time after the birth of the child (which took place in February, 1879) the respondent was very ill. She returned with her husband to Ross-shire in the summer of that year. On their way they spent a night at Edinburgh. The appellant took advantage of this opportunity to consult his legal adviser as to his rights with respect to the child. As the result of the interview he informed his wife that he had consulted Mr. Adam, and that now it was across the Tweed his power over the child was quite absolute, and that he could stop her seeing it if he chose. He seems to have been extremely anxious to ascertain his legal rights; and determined when he had ascertained them to assert them by whatever means he thought necessary. This seems the clue to much of his conduct: it was for him to maintain to the uttermost the rights which he deemed the law allowed him; it was for her to submit without question to their assertion.

My Lords, I may take this opportunity of saying that I quite believe the appellant acted throughout under the conviction that he was justified (nay, even bound) to maintain all his legal rights with regard to wife and child whatever mental pain might be

inflicted, and that it was her part dutifully to bow to his assertion of them, to bend her will to his, and submit her inclinations absolutely to his wishes. Much as I think his conduct misguided and censurable, I do not doubt that he was persuaded that he was always in the right, and, indeed, could scarcely be in the wrong; and I think this conviction dominated him throughout, and is an explanation of the course which he pursued.

In the autumn of 1879 the respondent was seriously out of health. She was suffering, among other things, from dyspepsia, and one symptom of her illness was great depression of spirits. Her husband in November of that year described her condition in a letter to her father thus: "Minna is just about the same—not worse, I think, but still very weak, and with very little appetite . . . Pray do not alarm yourself about her, she is not dangerously ill, only very weak." In December he again wrote thus: "I am very very anxious about her as she is no better. She certainly gets up every day, but she is becoming so thin and weak and eats nothing. She is always in very low spirits—never speaks when I come into the room." The doctors advised a change to the South as desirable, if not essential, for her restoration to health, and the appellant himself wrote to her that "for the sake of her health, her going South appeared to be a duty and a necessity." She was naturally desirous of taking her daughter, who was then only a few months old, with her. This her husband absolutely refused to permit. He was willing that she should herself visit her parents who lived in the neighbourhood of Liverpool, but resolved if she did so she should go alone, and that the child should remain with him. She refused to comply with this, I think, unreasonable condition. Whatever his legal rights, his conduct in refusing to permit her to be accompanied by her infant child when she was so far from well was harsh in the extreme. The reason which he alleged was the apprehension that the child's health might suffer from a journey to the South during the winter, and from her residence at Otterspool in air less pure than that of Ross-shire. I do not say that this was altogether a pretence; but I am of opinion that the more guiding motive is disclosed in his letter to Sir T. E. Moss, of the 5th of January, where he says: "The season of the year, the long journey, and

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teething, and not having been weaned, are the reasons I give to the world for not letting the child go South at present. But though I consider these quite sufficient reasons in themselves, I have other reasons for not letting baby go, and of which I think it right to let you and Lady Moss know. As long as Minna continues to act towards me unlike a wife (I may say unlike a Christian), I cannot and will not trust the child with her and away from myself. A wife who cannot behave properly to her husband is not fit to be trusted by him with his child; and unless Minna turns over an entirely new leaf, expresses sorrow for the past and promises amendment for the future, the child must remain here."

Her health, be it observed, rendered a visit to the South necessary, and yet in spite of her condition she was to be deprived of her infant child unless she expressed sorrow for the past, and promised amendment for the future. The child was to be retained by the husband in order to secure her submission.

It appears that the appellant, whilst residing in the same house with the respondent, was in the habit of communicating with her by letter rather than by word of mouth. On the 16th of January following, he wrote to her stating that as long as she continued to act as she was doing the child should not leave its home. The letter continued thus: "Our child is very young at present, but not long hence, if God spares her, she will be of an age to be readily affected by the example of those around her, and more especially by the example of her mother. I could hardly imagine a worse example to a child than yours is at present. If you do not amend your ways (sad though it would be) I may see it my duty to arrange that my child be not brought up under such bad influence and example." The behaviour of which he complained in this letter was, that she shewed utter indifference to him, and treated his advice and wishes with scorn. I see little evidence of any kindly advances on his part, to say nothing of any generous allowance for her state of health. He selected a period of illness and depression, not only for refusing to permit her child to accompany her, but for threatening a more permanent separation, with a view to removing the child from her bad influence and example, if she

did not mend her ways. It is not to be wondered at that such a letter should have seriously irritated the respondent, and led her to use an expression towards her husband which is to be regretted, though not perhaps to be much wondered at. The appellant wrote on the following day to the respondent's father to complain that she had said to him: "You brute!" and he added these words: "What I should have done then was to have put her under lock and key, and certainly if she ever attempts the like again I shall do so."

I think this throws a strong light upon the incident of the 4th of August. The appellant, in the previous January, evidently regretted that he had not placed his wife in durance, and threatened that he would do so in future in like circumstances. He was manifestly acting under the belief that he was entitled to use physical means in order to subdue her will and to reduce it to absolute submission to his own. He carried this conviction into practice when he removed the child from her arms by force. That this was his state of mind, and that he intended to give his convictions effect, is, I think, proved by the history of the case, since the respondent left the appellant's house on the 4th of August. He has never expressed any real regret for his conduct on that day. Even at the trial of this action he sought to justify it.

In 1884, some correspondence took place between the parties, with a view to a reconciliation, and to the return of the respondent to the appellant's home. In May of that year the appellant wrote that he was very willing to receive any proposal coming from her which would express contrition and a hearty desire to become thenceforward a dutiful wife, and that deep and heartfelt repentance on her part should always be met by kindness and forgiveness by him. But neither in that letter, nor in those which followed it, is there any trace of repentance or contrition on his part for the outrage he committed on the 4th of August, to say nothing of the physical pain his wife had then to endure. There is not the faintest expression of regret; not a symptom of consciousness that his own conduct had been in any respect blameworthy, or that some change was necessary in himself as well as in her if they were to live together in peace. He

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required solemn written assurances that she would not leave his place of abode without his consent, or by the advice of his family doctor, and that she would not associate in the parish of Gairloch with those with whom he could not be on friendly terms, meaning, as I understand, that she was to be debarred the society of all her relations and of his own brother and sister-in-law.

The respondent, in reply, expressed what I think was a very reasonable doubt whether one-sided assurances would be likely to conduce to their future happiness: "When quarrels arise," she said, "there are generally some faults on both sides, and it is usually the wisest course for both parties to forgive, and so far as possible, to forget. This is what I am anxious to do, and it will be a great help and encouragement to me if I find you willing to meet me half way." And in a subsequent letter she says: "It is my sincere desire to return and to remain permanently with you in your house as your wife, and to discharge all my duties as such, faithfully, and to the best of my power." What was his response? That "neither in words nor in the tone of these three letters is there any blaming of yourself, nor expression of sorrow for the seven sad years during which you have so embittered my days. How can I be hopeful for the future without I am assured of your heartfelt repentance for your conduct in the past?"

The appellant in November, 1884, wrote that he would be willing to receive her without the written assurances he had required; but he said: "I most emphatically warn you that, as your husband and head of the family, I feel I shall be obliged to enforce the terms of the assurances I asked for, and I shall require you never again to enter Pool House or its grounds, never to associate with persons in this parish of Gairloch who are not on friendly terms with me without my especial permission, nor leave me for short or long intervals without my consent, or by the advice of my medical man." And on the 18th of December, while purporting to make an unconditional offer for her return, he adds in a postscript: "You refer to my regulations, my earnest desire would be that they might never require to be put in force; but that would entirely depend upon yourself and your conduct." This, it seems to me, can have but one interpreta-

tion, that the regulations he had laid down were to be binding upon her, and would be put in force if requisite. There is, to my mind, no doubt that the means intended to be used were physical, that is to say, such restraint or force as were found necessary.

I have dwelt at some length on the attitude of the appellant during the years succeeding the separation and upon this correspondence, because it satisfies me that the respondent could not have returned to his house without apprehension that the unjustifiable violence he had used might be repeated. I think the anticipation of further violence well founded, and not an unreasonable or fanciful idea. After considering carefully the whole of the evidence, and giving full weight to the able arguments of the learned counsel for the appellant, I can entertain no doubt that circumstances existed which justified the respondent in quitting the appellant's home and refusing to return, and afforded ample ground for a decree of separation.

It is true that in 1887 the appellant again invited the respondent to return, and that the letter he wrote was couched in very different terms, and displayed an altered tone. The circumstances, however, under which it was addressed to her were peculiar. Proceedings were pending in the Court of Session with a view to secure that the child should live with the respondent during a portion of each year, and the appellant, no doubt, dreaded any considerable separation from his child. Accordingly, in a letter of the 16th of September, 1887, he said: "If you come, I shall (as I have said before) be anxious to let bygones be bygones, and begin our married life anew." But this letter was written for the purposes of the legal proceedings then pending, and was intended to influence the mind of the Court. It was boxed in Court before it ever came to the hands of the respondent. It is admitted that its terms were actually settled by counsel. I cannot think that it indicated any real change of mind, or that the respondent's return would have been the occasion for any alteration in his conduct, or in his conviction that absolute submission on her part was a right to be enforced by him by physical means, if necessary.

It is said that in her letter of the 13th of October, 1887, she

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refers to her realization of what her feelings towards him were, and not to any fear of his conduct in case she should return. I cannot agree with this. She alludes to the general treatment she had received at his hands, and to the fact that his letters up to June 13, let alone his conduct, spoke for themselves as to his feelings towards her, and she further indicates then, as she had done in a previous letter, doubts which I think were well-founded, of his sincerity in making that offer.

Having arrived at the conclusion that it is well established that there was sævitia on the part of the husband within the meaning of the law of Scotland such as to justify a separation, it follows, that in my opinion the interlocutor must be affirmed. But I may add that I am not satisfied that the appellant, during the time of the separation, was honestly desirous that the respondent should adhere, and used reasonable endeavours to that end. The Lord Ordinary took this view, and called attention to the important bearing on this part of the case of the evidence given by Mr. Dixon and to the significant fact that the appellant did not enter the witness box to contradict it.

I move your Lordships that the interlocutor appealed from be affirmed, and the appeal dismissed with costs.

LORD WATSON:—

[His Lordship stated the facts as above firstly set out, and continued:—]

The effect of a decree in the terms concluded for would be to give to the appellant, in immediate possession, the same interests in the estate of the respondent which he would have taken had the marriage been dissolved by her pre-decease.

A voluminous proof, oral and documentary, was led by both parties, which gives a very minute account of their married life from the date of their union until the time of their separation in August, 1880. The evidence applicable to the seven years which immediately followed the separation mainly consists of correspondence between the spouses or their law agents, and of proceedings taken by the respondent for the purpose of obtaining access to her child. It was not until the month of June, 1887, that the appellant made the offer to receive back the respondent,

upon which he relies as constituting the commencement of the statutory period of her non-adherence.

In the Court below two questions of some importance to the law were raised in argument, and were discussed by the learned judges. The first of these was whether the words "reasonable cause," occurring in the Act of 1573, signify some lesser occasion for a wife's leaving her husband's house than would be accepted as a good answer to an action of adherence; and the second whether, in an action of adherence, a wife can successfully defend herself upon any other grounds than would be required in order to sustain an action at her instance for separation and aliment.

Lord Young, in whose reasoning the Lord Justice Clerk expressed his concurrence, answers the first question in the affirmative. His Lordship says "that it is no criterion of the validity of a defence to an action of divorce on the Act 1573, c. 55, to inquire whether or not it would have been a good defence to an action of adherence at the common law." Lord Trayner appears to have entertained the same opinion. He says: "What is 'reasonable cause' in the sense of the statute? The language is in no sense technical. It means exactly what the words in their ordinary sense import, and no more. The spouse justifying his or her absence must satisfy the tribunal before whom the question may depend that the cause of his or her separation from, or desertion of, the other was reasonable, and therefore sufficient." The Lord Ordinary expresses the same view in his note.

I am not prepared to accept the proposition thus clearly stated, which if adopted might afford an easy solution of this case. The Courts of Scotland have never attempted to enforce a decree of adherence by means of civil process. The only remedy provided by Scotch law, where the offending spouse persists in avoiding cohabitation after decree, is to be found in the Act of 1573. Decree of divorce under that Act is, in my opinion, nothing else than a penalty for obstinate non-adherence. Accordingly the older statute requires, as the first step towards obtaining the remedy that the deserted spouse shall raise and obtain decree in an action of adherence, the decree to be followed by a charge

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of horning; and as the second step, that application shall be made to the Ecclesiastical Court for the admonition, and if that be not obeyed, for the excommunication of the offender, who, if he or she failed to resume cohabitation within the period allowed by the Act, after these preliminaries had been observed, could not resist a decree of divorce. A suit for adherence was an old and well-known process, and was not the creature of the Act. I do not think that the words "reasonable cause" in the first part of the Act, were intended to override or alter the law previously administered by the Judge Ordinary, when a process of adherence was brought before him. He, according to the Act, is the judge who must decide whether "sufficient cause" has been alleged and proved by the defender; but in determining what was sufficient cause, he was left to the guidance of the usual rules of his Court.

After the final establishment of presbytery the ecclesiastical procedure enjoined by the Act became, in course of time, a mere formality, because the Church Courts generally, if not invariably, declined either to admonish or to excommunicate. The Civil Courts ceased, in consequence, to regard admonition and excommunication as an essential preliminary. In *M'Lauchlan* v. *M'Lauchlan* (December 21, 1838) (1) it was held that a husband's offer to adhere came too late when his wife had obtained a decree of adherence, and had thereafter presented a petition to the presbytery, which was refused. Then came the Act of 1861, which provides "that it shall not be necessary, prior to any action for divorce, to institute against the defender any action of adherence, nor to charge the defender to adhere to the pursuer, nor to denounce the defender, nor to apply to the presbytery of the bounds, nor to any other judicature, to admonish the defender to adhere." In my opinion, the object of that enactment is, not to alter the substance of the older statute by giving any new right of action to the pursuer, or any new ground of excuse to the defender, but to simplify procedure by allowing the pursuer to prove non-adherence in his suit for divorce, and dispensing with the necessity for a separate action of adherence and all other preliminaries.

(1) 1 Court Sess. Cas. 2nd Series (Dunlop), 294.

Upon the second question the learned judges of the Second Division, with the exception of Lord Rutherfurd Clark, were of opinion that according to the law of Scotland, a lesser excuse will afford a good defence by a wife to an action of adherence than would be sufficient to entitle her to decree in an action for separation and aliment. There can be no doubt that the contrary was decided by the Second Division more than forty years ago in *A. B.* v. *C. D.* (December 3, 1853) (1), which was an action of adherence against a wife. In that case the Court inserted in their interlocutor an express finding to the effect "that the action can only be resisted on the ground that the pursuer so maltreated her, at and prior to the date of the contract, that she would at said time have been entitled to a judicial separation, and is therefore not now bound to adhere." The contract referred to was one of voluntary separation, under which the spouses had been living apart; and it had been previously held (*A. B.* v. *C. D.* (February 5, 1853) (2)) that the wife was entitled to the benefit of the contract unless and until her husband should obtain a decree of adherence. So far as concerned its facts the case was regarded by the Court as one of nicety; and their decision on the merits is, I think, fairly open to many of the observations which have been made upon it by Lord Young. But their decision upon the point of law, which is embodied in their decree, does not appear to have been treated with the consideration which it deserved. No case was cited in argument which has the remotest bearing upon it. In the opinions delivered, two of the four learned judges refer indirectly to the point, but cite no authority; the others take no notice of it. I am unable in these circumstances to regard the case of *A. B.* v. *C. D.* (1) as an authority of weight; and my impression is not diminished by the fact that the appellant's counsel, although invited to do so, were unable to refer your Lordships to a single previous decision in which its doctrine was recognised. On the other hand there are previous decisions which might possibly admit of an opposite construction.

The late Lord Fraser, in the last edition of his treatise upon

(1) 16 Court Sess. Cas. 2nd Series (Dunlop), 111.

(2) 15 Court Sess. Cas. 2nd Series (Dunlop), 372.

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Husband and Wife (vol. 2, p. 873), states that "there are defences pleadable against an action of adherence which would not in themselves have been the ground of an action for separation." Substituting for an action of adherence an action for the restitution of conjugal rights, the doctrine laid down by the learned author does not appear to have been accepted in England, but there is no authoritative decision on the point, by a Court of Appeal, or by this House. In Scotland, with the exception of the single case I have referred to, there is no clear authority for affirming that the grounds open to a wife, in a suit against her for adherence, and in a suit for separation at her instance, are necessarily identical. Upon both sides of the question there are considerations requiring to be carefully weighed; and its decision is, in my opinion, unnecessary for the purposes of this appeal, because I agree with your Lordships in thinking that the circumstances of the case are such as would have entitled the respondent to a decree of separation.

I shall not attempt a detailed examination of the evidence, of which a complete analysis is to be found in the able and exhaustive note of the learned judge before whom it was led. I do not suggest that any of the details noticed by the Lord Ordinary are without bearing upon the point which your Lordships have to decide; but it is unnecessary that I should rehearse them. I find sufficient materials for disposing of this appeal in the circumstances which occurred during the winter of 1879–80, whilst the respondent was residing in her husband's house at Inverewe, and, subsequently, in August, 1880, when the spouses were living at Tournaig, the residence of the Dowager Lady Mackenzie, the appellant's mother.

It appears from the evidence on both sides that, from an early period of their married life, the relations between these spouses became strained; and that, as time rolled on, the tension was not diminished. There were probably faults on both sides; but, in my opinion, it has now become a matter of very little moment to consider, in what respect and to what extent either spouse was to blame for the absence of a more cordial understanding between them. One source of disagreement was undoubtedly the appellant's mother, who was deeply attached to him, and for

whom he entertained, and with good cause, the greatest affection. She had given him the estate of Inverewe, which was her own property, and had also, in order to enable him to marry, made over to him two-thirds of her remaining income. However praiseworthy such filial attachment may be, it is, I apprehend, an undoubted fact, that it may be exhibited in such a way as to create dispeace in a son's married home. Unfortunately, it appears that the respondent entertained towards the dowager feelings of suspicion and dislike, which were fully reciprocated. Before marriage the respondent had indicated her apprehension of the dowager's interference in her domestic affairs; and, in order to remove these apprehensions, the appellant had given an honourable assurance that any risk of his mother's interference would be carefully avoided. Making all due allowance for the appellant's situation, it can hardly be said that the compact was observed by him. But that cause of complaint, though, as might be expected, it caused irritation, could not, in the most favourable view which could be taken for the respondent, have afforded a legal justification for separating from her husband.

The respondent gave birth to her child in the Lancashire residence of her father, with whom the spouses had lived during the preceding winter. She suffered greatly from her confinement, and her recovery was very protracted. From her father's house she went to Buxton, in the beginning of June, 1879, by the advice of Dr. Fitzpatrick, who had attended her during her confinement. At the end of June the appellant joined the respondent at Buxton, and shortly afterwards, as soon as she was able to travel, they went North together, taking the child and its nurse with them, to Inverewe, where they all remained until the month of February, 1880.

The respondent's health did not improve in Ross-shire as had been anticipated. In December, 1879, the appellant wrote to her father: "I am very anxious about her, as she is no better. She certainly gets up every day, but she is becoming so thin and weak, and eats nothing." And, on the 30th of the same month, he again wrote: "Poor Minna is no better. If you cannot persuade her to let me bring her South with me, then I think Lady G. M." (i.e. her mother) "should endeavour to come

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North to her." There is no doubt that, at this time, the appellant desired his wife to pay a visit to her relations in the South, and was satisfied that the change was advisable for the sake of her health; but there is as little doubt that he coupled with his otherwise proper recommendation the intimation that her child would not be permitted to accompany her. He states in his evidence, "In consequence of my refusal to let the child go, my wife refused to go to England. I then endeavoured to get her mother, or her brother, or her sister, to come and stay with us at Inverewe for the purpose of trying to rouse her and give her happiness." On the 5th of January, 1880, he called in Dr. William Bruce, of Dingwall, a medical gentleman of high repute, who found the respondent "suffering from acute dyspepsia," which, the doctor adds, "is a complaint which is markedly accompanied by depression." From him the appellant contrived to obtain an opinion, to the effect that the respondent ought to go South alone, and that the child ought to remain in Ross-shire. He did so by making representations as to the respondent's habitual indulgence in strong liquors and opiates, which he vainly endeavoured to justify in the witness-box, and which his counsel were constrained to admit had no foundation in fact, and also by representing, what he must have known to be false, that the respondent was not desirous that the child should accompany her. Accordingly, when Dr. Bruce was examined as a witness, he said as one would naturally have expected: "If I had known that the defender was eagerly attached to the baby, and greatly felt separation from it, that certainly would have altered my opinion, and I would not have forbidden the child to go. . . ." "If I had known that the separation was preying upon the mind of the defender, and would be acutely felt by her, I would clearly have advised that the child should go with the mother. It was a healthy, thriving child. Travelling with every comfort, there would have been no particular risk to the child." Few people would hesitate to agree with Dr. Bruce's later opinion, which had the advantage of being founded on fact, and not upon misrepresentation.

It might be unfair to the appellant to withhold the explanation, that, in enforcing the separation of mother and child, he

had in view not so much the advantage of the child as the subjection of the mother to what he seems to have considered wholesome discipline. He explained his object, more candidly than he thought fit to do in his evidence, in a series of letters addressed by him at the time to his sister-in-law Lady Mackenzie. These communications, being marked private, were burned on their receipt; but their import is thus stated by her ladyship: "The tenor of them was, that pursuer said his wife did not shew sufficient deference and obedience to him, and that he must punish her to bring her to a proper frame of mind."

There can hardly be a more odious form of cruelty than a deliberate attempt to wound the feelings of a mother through her affection for her infant child. It is nevertheless true, that the law of Scotland permits a married man, who is so inclined, to gratify his taste for that species of cruelty, subject to these conditions, that it must be practised upon his own wife, and that he must stop short of injuring her health of mind or body, or of rendering her existence intolerable. How far he can carry his experiments without exceeding the limits so prescribed, and thereby becoming guilty of legal sævitia, must depend very much upon the circumstances of the case, and, in particular, upon the victim's capacity of endurance.

The appellant appears to have selected a very unsuitable time for experimenting upon the respondent, with the view of recalling her to a sense of her conjugal duties of deference and obedience. She was physically weak and suffering from an ailment occasioning mental depression which reacted upon her bodily health. As the appellant himself states in one of his letters, she had not even a smile to bestow upon her child. On the 16th of January, 1880, the appellant wrote a letter to her, which I do not quote at length, in which he says: "As long as you continue to act as you are doing at present, the child shall not leave its home"; and again: "I could hardly imagine a worse example to a child than yours at present. If you do not mend your ways (sad though it would be) I may think it my duty to arrange that my child be not brought up under such bad influence and example." That is a fair specimen, and not the only specimen of the means by which the appellant sought to

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soothe the nervous depression of the respondent. I have omitted the pious expressions with which the epistle is garnished, which do not detract from its bitter tone, or from the cruelty of its menaces.

The letter in question led, as might have been expected, to a warm discussion between the spouses, in the course of which the respondent, in a moment of irritation, ventured to characterise the appellant's conduct as brutal. A man would probably have employed a harsher expression; but coming from a lady it was a strong one; and so the respondent, on reflection, appears to have thought; because she at once made an ample apology for the language which she had used, which was listened to by the appellant with sullen indifference. The state of his temper appears from the terms of a letter which he wrote, the next day, to his father-in-law, in which he says: "'You brute' was one of the many things she said. What I should have done was to put her under lock and key; and, certainly, if she ever attempt the like again, I shall do so."

In the beginning of February, the two spouses, accompanied by their child, went on a visit, for a fortnight, to Conan, the seat of appellant's half-brother, Sir Kenneth Mackenzie, where, under the influence of kindness and attention from her hosts, the respondent's health somewhat improved. During their stay at Conan, the appellant discovered, or to speak more accurately, asserted that he had discovered "the plot" about which your Lordships heard so much in the course of his counsel's argument. I do not think it necessary to notice that incident, beyond observing that it illustrates the proneness of mankind to believe only so much of the truth as will suit their own purposes. The "plot" had been suggested, but had been discarded, and was never meant to be carried out. But the appellant would neither listen to reason nor explanation, probably because his distorted version of what had actually occurred appeared to him to afford some justification for separating the child from its mother, a step which he must have felt to be harsh, and, in the circumstances, unwarrantable; otherwise he would hardly have stooped to mislead Dr. Bruce, by giving him false information.

The respondent went to England from Conan, whilst the

appellant went back to Inverewe, taking the child with him. She first went to her father's house in Lancashire, where she remained until the end of April, when she accompanied the other members of her family to London, returning to Ross-shire in the beginning of July, 1880.

The effect of her treatment at Inverewe was to create in the mind of the respondent a nervous apprehension that she would be deprived of her personal liberty; and she communicated her fears to Lady Mackenzie, on her arrival at Conan. "She was afraid, after the threats that had been made, that she might be locked up, and not allowed to see any friends, and she did not know what accusations might be made against her in her defenceless state." There can be little reason to doubt that the respondent had good cause for entertaining these apprehensions. Their reality is demonstrated by the appellant's letter of the 17th of January, which has been already referred to. It contains, besides the passages quoted already, this intimation, made in view of their intended visit to Conan: "I might as well put her under restraint at once as bring her back here from Conan in her present mood." There is, about the same period, a correspondence between the appellant and his uncle, the late Dr. Mackenzie, which contains equally unpleasant suggestions in the same direction.

I think it is also shewn by the evidence that the appellant's conduct had a malign effect upon the respondent's health, and was not only calculated to interfere with, but did, in point of fact, retard her recovery. The appellant must have known from Dr. Bruce that the illness of the respondent was one markedly attended with great depression of spirits. At all events he did know, to use his own expression, that her ailment was "not so much that of her body as that of her mind"; and the specific which he employed in order to work a cure was one which could only enhance her mental distress, and aggravate her illness. It hardly required medical evidence to prove that it is an experiment fraught with risk to a mother to separate her, against her will, from her infant child. Dr. Bruce expresses the opinion that, if her child had been allowed to accompany the respondent, "it would have helped her to get better." Dr. Fitzpatrick, who

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attended the respondent in Lancashire, in March and April, 1880, says: "Speaking medically, I think the separation of mother and child at that age would have a very serious effect. Even in the case of a person in robust health, the separation of a mother from her first child is very serious." The same gentleman attributes the depressed condition of the respondent, bodily and mental, during the period of his attendance, "entirely to the child not being allowed to come south with her." After she went to London, the respondent had a very serious attack of illness connected with her confinement, and was attended by Dr. Andrew Fyfe and the late Dr. Matthews Duncan. Dr. Fyfe, in his evidence, attributes her condition at that time, and her slow recovery, to something upon her mind; of course he did not know what. But your Lordships can have no hesitation in believing the respondent's statement, that the only thing which preyed upon her mind at that time was enforced separation from her infant.

As already stated the respondent returned to Ross-shire in the beginning of July. Meantime, the appellant had let Inverewe House for the season, with the shootings, and had gone to reside with his mother at Tournaig, a house upon the estate which had been recently built for her accommodation. The respondent, who was still in feeble health, journeyed north, under the care of her mother's maid, who was not permitted to cross the threshold of Tournaig. The appellant had previously suggested that, instead of going to Tournaig, the respondent should see her child for a few days at Loch Maree Hotel, if she did not wish to become his mother's guest, and it is clear that it was her affection for the child which induced her to go to Tournaig, where she was very coldly received.

At Tournaig the respondent breakfasted in bed. The child generally got its morning meal in the nursery, and then joined its father and grandmother in the parlour. On the morning of the 4th of August, the respondent was giving the child breakfast in her bed, when, before the child had finished its meal, there came a peremptory demand that it should be sent downstairs; and, the respondent having delayed or declined to comply with it, the appellant and his mother at once entered

her bedroom, and proceeded to hold her down by main force until the child was removed by the nurse. The dowager, who ought not to have been there, and who used, when there, irritating expressions which ought to have been left unsaid, employed her physical force with some measure of discretion. The appellant, who was white with passion, did not observe the same moderation. He left the imprint of his fingers in black and blue upon the respondent's arm, the marks being visible four or five days afterwards.

The appellant, in his evidence says, "It was a very unfortunate incident." I agree with the observation, but I am inclined to doubt whether he used the expression "unfortunate" in the same sense in which I assent to it. The whole tenor of his conduct and correspondence leads me to believe that he thought at the time, and is still under the impression, that the respondent was alone to blame for the incident, and that the violence shewn by him to a weak woman was not exactly laudable, but in the circumstances proper and justifiable. The respondent left his house immediately after the outrage was committed. At leaving she was allowed the privilege of kissing her child, which was held in its father's arms, and she was not permitted to embrace it.

I do not impute to the appellant that his conduct, cruel and reprehensible though it was in my estimation, was dictated by a wilful intention to injure the respondent. That he is a man capable of entertaining strong affection, his attachment to his mother and to his child afford ample proof. But he had some peculiarities, and amongst these was a very exalted sense of the dignity and supremacy of his position as husband, and of the absolute deference which he was entitled to exact from his partner in life. He appears to have assumed that he was justified in adopting any means that occurred to him for the purpose of enforcing what he deemed to be his rights; and that the infliction of mental distress, even to the aggravation of her bodily ailments, physical restraint or personal violence were, should he think it advisable to resort to them, consequences for which the respondent was alone to blame. Add to this that it seems never to have entered into the mind of the appellant to

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conceive the possibility of his being in the wrong. Accordingly, when he thought his rights had been infringed, nothing would satisfy him, short of the deepest penitence and most abject contrition on the part of the respondent; whilst in instances where he was unquestionably the aggressor, the utmost stretch of magnanimity of which he was capable was to bestow a qualified pardon upon the spouse whom he had injured.

Such was the position assumed by the appellant, and consistently maintained by him in his communications with the respondent between August, 1880, and July, 1887. His correspondence during that period was much better calculated to repel than to invite her return to his home. The evidence shews that her return was not at that time desired by him; and it is not surprising that his counsel should have rested his charge of non-adherence upon her living apart from him during the four years which preceded the institution of this action. The appellant's letter of the 13th of June, 1887, is expressed in very different terms. But it would, in my opinion, have been entitled to more favourable consideration if it had been dated in the year 1880; and the circumstances in which it was written were not such as to encourage a belief in its sincerity. It was admittedly prepared by counsel, and the motive by which it appears to have been dictated was not any sudden change in his feelings towards his wife, or in his views as to the propriety of the course of conduct which had driven her from his house, but the fear that the Court of Session would deprive him of the custody of the child unless he made a more kindly profession of his intentions towards its mother than he had done during the seven years preceding. Having regard to the previous conduct and correspondence of the appellant, extending over a period of nearly seven years, I am not satisfied that in June, 1880, or subsequently, he ever entertained an honest desire to resume cohabitation with the respondent, and, if he really did so, I am satisfied that, instead of taking reasonable means to convince the respondent of his sincerity, he proceeded in a way well calculated to throw doubt upon it.

I need not, however, dwell upon that point. I prefer to rest my judgment upon the grounds which I have already indicated.

The circumstances which I have thought it necessary to notice, consisting in conduct on the part of the appellant creating mental distress sufficient to interfere with the respondent's restoration to health, in menaces sufficient to create a well-founded apprehension of physical restraint, and culminating in an act of violence against her person, appear to me to afford ample grounds for holding that the respondent, after she left his house in August, 1880, would have been entitled to a decree of separation if she had chosen to insist for it.

I therefore concur in the judgment which has been moved by the Lord Chancellor.

LORD ASHBOURNE :—

My Lords, the law sought to be applied by the husband in this case against his wife is peculiar to Scotland, and is not found in the laws of England or Ireland. It is obvious that a law which, conceding the perfect morality of the spouse, permits a divorce a vinculo on proof of her desertion without reasonable cause persisted in with malicious obstinacy for the space of four years, demands the most jealous scrutiny and the most rigorous caution. Its consequences are irrevocable. It strips the wife of her name, and hands over her fortune to her husband—regarding her as dead. It is susceptible of gross abuse : it could be availed of by cruel and calculating cunning, and the ties of an irksome marriage could also thus be readily dissolved by collusion. But such desertion alone will not suffice. Even if the wife had no reasonable cause for going away, and for remaining away, the husband must still shew that he has come into Court with clean hands—that he himself was not only willing to adhere, but that he used all reasonable means to induce the wife to return to cohabitation, and that he sincerely took all honest steps to win her back. The facts of this case are of the highest importance. Rightly understood, they not only lead to a clear decision, but they entirely get rid of all legal controversy and difficulty. The pursuer states, as his great fact, that his wife since the 4th of August, 1880, has not lived with him. This is true ; and the occurrences of that day are of vital importance ; but the circumstances of the whole of

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this unhappy married life before and after that date have to be clearly appreciated in order to realize the position of the spouses, the conduct of the husband, and the standpoint of the wife.

The pursuer is a Highland gentleman of good family, of austere mind and exacting nature. He married the defendant some eighteen years ago, she being a young lady of good position, fortune, and education. It is most sad to think that but for the existence of his mother their married life might possibly have been unbroken and untroubled. It had been made a natural condition that the young wife was to be the mistress of her own new home, and that her mother-in-law was to remove. I sympathise with the deep affection which clearly bound together this mother and her son; but it is too plain that the condition was speedily broken or evaded, both in form and substance. The letters of Dr. Mackenzie at the beginning of this life shew that he foresaw "certain sorrow" in this continuance of the dowager's influence over the life and the home of her son. I am well assured she intended no harm, but the injury she did was immense and continuous. When the defendant was sick and ailing, with, it may be, the wayward fancies of an invalid, desiring to see her family and get a needed change, to take her child with her, to be a little soothed and comforted and loved, how different might it have been if the husband had had no one to take hard counsels with, no one to be constantly telling him of his wife's shortcomings and his own matchless perfection! From first to last, from the coming of the wife, from the appearance of the child, whilst the wife was absent in England and on her return, during the wretched scene of the 4th of August, in the correspondence, in the confidences, one sees with plain and painful distinctness that the son was ever sustained in his views by his mother, and that no kind or deprecating word was ever used on behalf of the young wife, away from her own people—often sick and low and wretched. This luckless influence was foreseen by the defender's father, it was foreseen by the pursuer's brother; the experience of all mankind supports the warnings given, and it would be hard to punish the wife for the results of breaking a condition, on which her dead father insisted, and to which she herself clung with all

the clear-sighted tenacity of a woman who instinctively felt that the happiness of her whole married life was at stake.

The pursuer was admonished by his uncle that in the eyes of the law his wife was to him an "utter slave." He certainly demanded from her strict obedience and constant acknowledgment of error. His manner to his wife from some of the evidence would appear to have been rough, and his brother says on one occasion "bearish." The child was born on the 1st of March, 1879, but brought no peace to the spouses. The infant was almost used as a weapon against the wife. He wrote to her father, when the child was only some ten months old, that to punish his wife he would not let her child go South with her. About the same date he wrote to the wife, "If you do not amend your ways I may see it my duty to arrange that my child be not brought up under such bad influence and example." This to a delicate sick woman about her little infant girl! It is impossible to conceive a more cruel, harsh, and unfeeling threat. Under its sting she used the strong word, "You brute!"; whereupon he at once wrote to her father, that if she did it again he would put her under lock and key. What were the kind of general complaints he had against her? Breakfasting in bed when not actually ill, shaking out her napkin and looking about when he was saying grace at dinner, kneeling on the seat of her chair at prayers, coming into prayers in the morning and sitting in the drawing-room in her dressing-gown. This gentleman so punctilious about small observances from a delicate wife did not hesitate to send an open telegram to her father saying that the doctor had forbidden her wine and brandy, which might have led to injurious suggestions, and shewed great recklessness and disregard to her feelings and those of her family.

In the midst of all this wretchedness came the painful scene of the 4th of August. Mrs. Mackenzie was in bed in the morning and with her hand disabled and bound. She had her infant child with her. Her husband, annoyed that his wife should have the child at the hour when he was accustomed to have her with him at breakfast, went up to the room. His mother followed him and the nurse stood at the foot of the bed. The husband seized one arm violently and his mother seized the other, and

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thus dominated by superior force, Mrs. Mackenzie had to let go her child, who was then carried off by the nurse. I do not think that Mr. Mackenzie intended any serious personal injury to his wife, but as a fact he used such force in holding her down by the arm that it was black and blue for days. This was a painful scene—one that might be forgiven but could never be forgotten, and Mrs. Mackenzie left the house as soon as she could, and has never since lived with the pursuer. His conduct justified her leaving, and gave her reasonable cause.

That incident cannot be regarded as isolated, as strange and marvellous in the married life of this couple. It may, indeed, be the leading and principal scene in the drama of their married life; but there were other very painful scenes. It did not stand alone. His whole conduct before the 4th of August, 1880, during her illness, after the birth of her child, his threats to her father, his warnings to her, all shewed a habit of mind towards his wife that left little room for hope of future peace or happiness. The next day she came to bid her child good-bye. He would not let the child out of his arms, and said she did not deserve to be let kiss her. It never crossed his mind that he had anything to regret—done anything to be forgiven.

The wretched separated life dragged on. The mother was not allowed to give her child presents—a strange and unnatural restriction, harsh and indefensible. Mrs. Mackenzie in 1884 made a genuine and sincere effort at reconciliation. Her letters were natural, proper, right-minded. The pursuer replied hardly and harshly—shewing a desire not to meet his wife half-way or at all—a steady purpose not to be reconciled. Then a change came; whilst the wife's application for the custody of her child was pending, in June, 1887, he sent her a letter—a proper letter, settled by counsel. His wife suspected the motive of the letter, did not believe in its bona fides, and the judge who saw and heard the parties, said she was justified in holding her suspicions. The pursuer, in truth, was thinking of divorce all through. Mr. Dixon's evidence teems with the topic. Dr. Mackenzie's letters are full of advice leading up to divorce—to keep a note-book with appropriate entries, to be "legally kind."

Regarding all the circumstance of the case, I arrive at the

clear conclusion that the violence of the 4th of August, 1880, the mental torture to which she was subjected, the dread of coercion and confinement caused by her husband's threats, would have entitled the wife to ask for a judicial separation, and therefore in any view of the law to resist a suit for adherence.

The appellant has argued that the reasonable cause, under the Act of 1573, must be such as would have afforded a defence to an action of adherence, and that a wife could not succeed in a defence to an action for adherence unless upon proof that would support a demand by her for judicial separation. The conclusion at which I have arrived on the facts renders it unnecessary to decide either point.

During the argument much reliance has been placed upon the case of *Paterson* v. *Russell* (1). The case can hardly be regarded as conclusive upon any legal point. It turns entirely upon its own special facts. Lord Brougham was apparently sitting alone, and appears at an early stage to have taken a strong view against the decision of the Scotch Courts. With great deference I am personally far more impressed with the persuasiveness of the view of the Scotch judges, but of course Lord Brougham's judgment is binding, and whenever the very same state of facts presents itself I should feel coerced to follow it.

I adopt and do not seek to go behind the opinion of Lord Wellwood on the facts, he having seen and heard the witnesses. In my opinion, Mrs. Mackenzie had reasonable cause for leaving her husband's house, and for staying away from it. In my opinion also, the pursuer never contemplated or wished for the return of his wife. Her genuine offers of reconciliation he slighted and put away; and his own offers were regarded by the wife not unnaturally with suspicion, and as not made with a bonâ fide desire to win her back, but rather as steps to a process of divorce for desertion, which would have stripped her of name, home, and fortune. I concur in thinking his appeal should be dismissed with costs.

LORDS MACNAGHTEN and MORRIS concurred.

(1) 7 Bell's App. 337.

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The Lord Advocate:—

The costs should be taxed as between agent and client—that is, allowing to the wife her costs in the sense of all that was reasonably necessary. That is the recognised principle of taxation in these cases where the wife is put on her defence: *Collins* v. *Collins* (1).

Asher, Q.C.:—

Here the wife has a large separate estate, and is living apart from the appellant; therefore there is no room for the suggestion that the husband is answerable for the wife's debts, the principle on which costs are allowed to the wife in these cases as between agent and client.

Interlocutors appealed from affirmed, and the appeal dismissed with costs, to be taxed as between agent and client.

Lords' Journals, 16th May, 1895.

Agents for appellant: *Druces & Attlee, for J. & A. F. Adam, W.S., Edinburgh.*

Agents for respondent: *Grahames, Currey & Spens, for Tods, Murray, & Jamieson, W.S., Edinburgh.*

(1) 9 App. Cas. at p. 242.

[HOUSE OF LORDS.]

ERNEST OSGOOD HANBURY . . . . APPELLANT;

AND

CLARA MARTHA HANBURY . . . . RESPONDENT.

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Divorce—Alimony—Income of Respondent—Profits of Partnership Business—Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *s.* 32—*Matrimonial Causes Act*, 1866 (29 & 30 *Vict. c.* 32), *s.* 1.

Upon an application after a decree for dissolution of marriage for an order under sect. 32 of the Matrimonial Causes Act, 1857, that the husband should secure to the wife an annual sum of money, it appeared that he was partner in a brewery and was entitled to receive £200 per month in respect of his share of the profits, but could not draw anything more without the consent of his partner. His share of the profits had for several years past amounted to about £3300 a year, but he had received only the monthly allowance, amounting to £2400 a year, the rest being carried to his credit in the partnership books.

The Court of Appeal (reversing the decision of the President) held that, for the purpose of determining the amount of the annual payment to be secured to the wife, the husband must be treated as having only an income of £2400, and made an order that he should secure to her the yearly sum of £300 in addition to the yearly sum of £500 a year already secured to her by her marriage settlement.

Upon appeal to the House of Lords, their Lordships expressed their opinion that, having regard to the circumstances, an application for an order under sect. 1 of the Act of 1866 was the more appropriate proceeding, and ordered that the order appealed from should be reversed, and that the husband should under sect. 1, during the joint lives of himself and his wife, pay her £600 a year in monthly instalments.

CROSS-APPEALS from an order of the Court of Appeal (1), varying an order of Sir F. Jeune, President of the Probate and Divorce Division, by which Ernest Osgood Hanbury, the respondent in a petition for divorce, was directed to secure to the petitioner during her life or until she married the yearly sum of £600, in addition to the yearly sum of £500 already secured to her by a settlement executed by the respondent.

The petition was by the wife for a dissolution of her marriage with the respondent, who was a partner in a brewery. A decree

(1) [1894] P. 315.

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absolute was pronounced on the 20th of December, 1892, and the custody of the five children of the marriage, aged, in 1894, fifteen, thirteen, eleven, ten, and seven years, was given to the petitioner.

The respondent was about fifty years of age and was of weak mind. He was a brewer in partnership with a Mr. Jude; but at the date of the order appealed from he was only a sleeping partner. The deed of partnership was dated November, 1874, and there were deeds of arrangement of March, 1885, and April, 1887.

The respondent's capital in the business was about £15,000. By the partnership deeds each partner was to have 5 per cent. on his capital; then the profits were to be divided: half to be paid to Mr. Jude, and of the other half £1000 a year to be paid to Mr. Jude as managing partner, and the remainder to go to the respondent. By the partnership deeds the respondent was not allowed, without the consent of Mr. Jude, to draw more than £200 a month—namely, £2400 a year—on account of profits, the balance due, after deducting the monthly drawings, to be placed to his credit in an undrawn profits account, which amounted to about £3500 in 1894. As a matter of fact, Mr. Jude did allow the respondent to draw £3000 a year. His share of profits, subject to a deduction for capital withdrawn, had been about £3300 a year. The deed of 1874 provided (sect. 19) that "no partner shall enter into any bond or become surety with or for any person, or subscribe any policy of insurance"; and that (sect. 20) "no partner shall do or willingly suffer anything whereby or by means whereof, the stock-in-trade, capital, or property of the partnership may be seized, attached, or taken in execution." These clauses were re-inserted (clauses 11, 12) in the deed of arrangement, dated April, 1887, which deed also provided—Clause 19: "If on taking any such general account as aforesaid it shall appear that losses have been incurred whereby the capital of the partnership for the time being paid up has been reduced to £18,000, then and in such case, if either partner shall be desirous of determining the partnership," [they were to be at liberty to do so.] Clause 20: If either partner shall be desirous of retiring from the partnership on the 1st of October, 1888, or

any subsequent 1st of October, and of such desire shall give notice in writing to the other partner not less than twelve months previous to the 1st of October on which said partner wishes to retire, then on such last-mentioned day the partnership shall cease. Clause 21 : If either partner shall retire under clause 20, the continuing partner shall have the option of purchasing the share and interest of the retiring partner. Clause 22 provided: "If either partner shall retire, he shall not directly or indirectly be concerned in or follow the business of a brewer."

By clause 27, the illness or incapacity of the respondent was not to terminate the partnership, nor give the said W. Jude a right to dissolve the same; and, in fact, there seemed no other provision for determination of the partnership than by notice, as set out in sect. 19.

By marriage settlement, dated the 5th of August, 1885, the respondent covenanted to pay a capital sum of £8000, when the capital sum of £15,000 should, by reason of death, illness, or retirement from business of the said E. O. Hanbury, cease to be required for business purposes, to the trustees of the settlement, and to pay the yearly sum of £500, until the sum of £8000 should be paid, as a fund for the maintenance of the petitioner and the children, such provision not to include the costs of education. The respondent also covenanted, by his ante-nuptial marriage contract (May 4, 1875), to settle to be paid on his death £2000 for the benefit of the petitioner and the children of the marriage. By deed of covenant of the 3rd of December, 1889, the payment of the above-mentioned capital sum of £8000 was charged by the respondent upon all the capital moneys in his business.

The President of the Probate and Divorce Division (Sir F. Jeune) (1) ordered the respondent to secure, under a deed settled by one of the conveyancing counsel of the Court, in addition to the £500 a year already secured by the marriage settlement, the annual sum of £600 for the petitioner's life or until she married. The Court of Appeal (Lindley, Lopes, and Kay L.JJ.) varied the President's order by substituting the annual sum of £300 for the annual sum of £600 (2), and referred to one of the conveyancing counsel to settle a proper deed, but that such deed be so settled

(1) [1894] P. 102. (2) [1894] P. 315.

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as not to prejudicially affect the rights of the respondent under the deed of partnership between him and Mr. Jude.

Both parties appealed. The respondent, on the ground that the order was made under the Matrimonial Causes Act, 1857, s. 32 (1), and contemplates a charge on property which could not be properly charged—namely, profits from a business—and, moreover, was final, whereas the order ought to have been made under the Matrimonial Causes Act, 1866 (2), which provided that the order might be varied by the Court from time to time.

(1) 20 & 21 Vict. c. 85, s. 32: "The Court may, if it shall think fit, on any such decree, order that the husband shall, to the satisfaction of the Court, secure to the wife such gross sum of money or such annual sum of money for any term not exceeding her own life as having regard to her fortune (if any) to the ability of the husband and to the conduct of the parties it shall deem reasonable, and for that purpose may refer it to any one of the conveyancing counsel of the Court of Chancery to settle and approve of a proper deed or instrument to be executed by all necessary parties."

(2) 29 & 30 Vict. c. 32, preamble and s. 1: "Whereas, by the Act passed in the session of Parliament, holden in the 20th and 21st years of the reign of Her present Majesty, intituled, 'An Act to Amend the Laws relating to Divorce and Matrimonial Causes in England,' it is, by the 32nd section, enacted 'That the Court may, on pronouncing any decree for a dissolution of marriage, order that the husband shall to the satisfaction of the Court secure to the wife such gross or annual sum of money as to the Court may seem reasonable, and for that purpose may refer it to one of the conveyancing counsel of the Court of Chancery to settle and approve of a proper deed to be executed by all necessary parties.'"

"And whereas it sometimes happens that a decree for a dissolution of marriage is obtained against a husband who has no property on which the payment of any such gross or annual sum can be secured, but nevertheless he would be able to make a monthly or weekly payment to the wife during their joint lives: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal and Commons in this present Parliament assembled, and by the authority of the same, as follows:—

"(1.) In every such case it shall be lawful for the Court to make an order on the husband for payment to the wife during their joint lives of such monthly or weekly sums for her maintenance and support as the Court may think reasonable: provided always that if the husband shall afterwards, from any cause become unable to make such payments it shall be lawful for the Court to discharge or modify the order, or temporarily to suspend the same as to the whole or any part of the money so ordered to be paid, and again to revive the same order, wholly or in part, as to the Court may seem fit."

The petitioner appealed against the order of the Court of Appeal, inasmuch as it reduced the amount of alimony.

The respondent objected to the competency of the cross-appeal; but the Appeal Committee (15th of June, 1894) disallowed the objection.

May 2, 3, 7. Sir *R. E. Webster*, Q.C., and *Bayford*, Q.C. (with them *Gregory* and *Barnard*), for the respondent:—

The President and the Court of Appeal were wrong in making the order under the first (20 & 21 Vict. c. 85) Act, and not under the later (29 & 30 Vict. c. 32) Act. The alimony cannot be properly secured under this partnership on the profits of the business; and an order once made under the first Act would be final: *Benyon* v. *Benyon* (1); *Medley* v. *Medley* (2); *Morris* v. *Morris* (3); *Jardine* v. *Jardine* (4). Under the partnership agreement there is no power for the respondent to enter into a bond, &c.

Under the later Act, if any circumstances arise rendering it necessary to alter the order, the Court can modify the order, but not so if made under the first Act. That is a final order. The petitioner takes £8000 under the settlement and £2000 under their marriage contract; so, after the respondent's death, she takes £10,000, and in addition to that, £300. The circumstances are such that he might be thrown back on his capital to-morrow; it, therefore, would be proper to make the order for their joint lives under the second Act, which was specially passed to meet such a case as this, where it may be absolutely necessary, owing to unforeseen events, to make a fresh application to the Court.

Inderwick, Q.C. (with him *Bargrave Deane*), for the petitioner:—

The objection to an order under the Matrimonial Causes Act, 1866, is that it would make no provision for the petitioner after the respondent's death. If the partnership were to be dissolved and the assets realized, the amount of the respondent's share

(1) 15 P. D. 29, 54.
(2) 7 P. D. 122, p. 125.
(3) 31 L. J. (P. & M.) 33.
(4) 6 P. D. 213.

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would be a sum between £20,000 and £30,000, upon which £8000 has already been secured, and the petitioner would also, according to the order appealed from, be entitled to £300 a year for her life. If an order were made under the Matrimonial Causes Act, 1866, a larger amount should be given to the petitioner for the joint lives of herself and the respondent. It has no doubt been decided that, in the case of an order under the Act of 1857, the provision must be made once for all; but there is no reason why such an order should not direct an annuity to be paid varying according to circumstances, such as the dissolution of the partnership.

[LORD HERSCHELL L.C.:—Supposing the partnership ceases, £200 a year would be all that would be left for the respondent, calculating that the capital would bring in 3 per cent. If he dies, his estate will be £24,000. £8000 is secured to the wife and £2000 to the children. That is as much as would ordinarily be secured.]

This would be so after his death; but if the partnership were dissolved before his death, the petitioner would be left without any provision.

[LORD HERSCHELL L.C.:—That seems to suggest the advantage of making the order under the Act of 1866, for it might be provided that the annuity should continue during the joint lives of petitioner and respondent. Under the first Act the Court must consider all contingencies. It would not be right to strip the respondent of almost all he has, should those events happen. I do not see that the Court would be likely after his death to make a greater provision out of his estate of £24,000 than the £8000, which is one-third. Then we have only to consider what provision should be made during the joint lives of the petitioner and respondent. This can be made under the second Act without difficulty. We are not hampered by the fear of giving too much to the wife. Under the first Act one would be bound to be cautious, and to ascertain that the order was for an amount which the respondent would in all events be able to pay. This would probably be something very different from what he might be ordered to pay under the second Act; for if any mistake were made, the Court under that Act would have power to reduce the

amount. I should have thought it was obvious that, under these circumstances, it was to the interest of the petitioner to have the order made under the second Act.]

Under the first Act an order might be made that the petitioner, during the joint lives of the parties, might have a third of the income of the respondent.

[LORD WATSON:—That would lead to endless litigation as to what the amount of his income was.]

Having regard to the £1000 of the respondent's profits which go to Mr. Jude, his profits are really £4000 a year.

[LORD HERSCHELL L.C.:—The Court of Appeal reduced the amount from the one-third of the income which had been fixed by the President by reason of the limit on the amount which the respondent was entitled to draw out, and gave on that account less than one-third of his income. At the present time that would seem too little. On the other hand, it may be questionable whether the mere reduction of the amount to £800 a year is under all circumstances a just provision, having regard to the possibility of a dissolution of partnership. Then, looking at what the respondent's capital is, as far as one can see, and including all that can be reckoned as capital, the just order would be not to make any provision after his death, because then the wife will have a third of his estate as estimated, but to make the provision at present one-third of what one knows to be the income, which would be the £1100 at which the President fixed it; to make that provision only during the joint lives, and to let it be subject to modification by the Court if circumstances should so alter that it should turn out to be much more than a third of the respondent's income. It would be made specifically under the second statute.]

LORD MACNAGHTEN and LORD SHAND concurred.

Inderwick, Q.C., then consented that an order should be made as suggested under the Act of 1866.

Due consideration had of what was offered on either side in the said original and cross appeals:
Ordered:—That the said order of the Court of Appeal

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of the 11*th of April*, 1894, *be reversed: Further Ordered, in lieu thereof, That the said Ernest Osgood Hanbury do make to the said Clara Martha Hanbury the payments ordered by the Court of Appeal down to this date, and that, from this date, during the joint lives of the said Ernest Osgood Hanbury and Clara Martha Hanbury, the said Ernest Osgood Hanbury do, under the provisions of the* 29 *&* 30 *Vict. c.* 32, *make to the said Clara Martha Hanbury payment of the sum of* £600 *a year in monthly instalments: And it is further Ordered, That the said Ernest Osgood Hanbury do pay to the said Clara Martha Hanbury the costs incurred by her in the Courts below: Further Ordered, That the said Ernest Osgood Hanbury pay to the said Clara Martha Hanbury the costs incurred by her in respect of the said original and cross appeals.*

Lords' Journals, 7th May, 1895.

Solicitors for E. O. Hanbury: *Hanbury, Hutton & Whitting.*
Solicitors for C. M. Hanbury: *Routh, Stacey & Castle.*

[PRIVY COUNCIL.]

ABBOTT . . . . . APPELLANT;

AND

THE MINISTER FOR LANDS . . . . RESPONDENT.

J. C.
1895
Jan. 30;
March 30.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Law of New South Wales—Crown Lands Alienation Act, 1861, *s.* 22—48 *Vict. No.* 18, *s.* 2, *sub-s.* (*b*); *s.* 42—*Right to make Additional Conditional Purchases.*

Where the appellant effected a conditional purchase under sect. 22 of the Crown Lands Alienation Act, 1861, of land adjoining to Crown land which had been previously granted to him in fee simple under sect. 25:—

Held, that he did not become thereby a holder of an original conditional purchase within the meaning of sect. 42 of 48 Vict. No. 18, so as to obtain the right to make additional conditional purchases under that section:

Held, further, that even if sect. 22 of the repealed Act of 1861 did confer upon him as the fee-simple holder of land the right claimed, sect. 2, sub-sect. (*b*), of the later Act was inoperative to preserve such right.

The mere right, existing at the date of a repealing statute, to take advantage of provisions of the statute repealed is not a "right accrued" within the meaning of the usual saving clause.

APPEAL from an order of the Supreme Court (Dec. 19, 1893), affirming an order of the Land Court of the Colony upon a case stated under 53 Vict. No. 21, s. 8, sub-s. 6, disallowing the application of the appellant for an additional conditional purchase and a conditional lease of land in the Eastern Division of the Colony.

The facts are stated in the judgment of their Lordships.

Byrne, Q.C., and *Sargant*, for the appellant.

Cozens-Hardy, Q.C., and *Vaughan Hawkins*, for the respondent.

The cases cited were *Ricketson* v. *Barbour* (1) and *In re Charles Baldwin* (2).

* *Present*:—THE LORD CHANCELLOR, LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, LORD SHAND, and LORD DAVEY.

(1) [1893] A. C. 194. (2) N. S. W. L. R. vol. xii., Cases at Law, p. 128.

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1895. March 30. The judgment of their Lordships was delivered by

THE LORD CHANCELLOR:—

The appellant on the 20th of March, 1871, purchased forty acres of Crown land in the county of Brisbane, which had been offered for sale by public auction and not sold, and they were granted to him in fee simple. The sale was carried out under the authority of sect. 25 of the Crown Lands Alienation Act, 1861 (24 Vict. No. 1).

On the 27th of November, 1873, the appellant took up a conditional purchase of forty acres adjoining the land he already held, and on subsequent dates he became the conditional purchaser of four other areas of forty acres each.

On the 17th of March, 1892, the appellant tendered to the land agent at Scone an application for an additional conditional purchase of 150 acres adjoining the holding formed by the purchases already mentioned, and lodged with such application a deposit at the rate of 2*s.* an acre.

On the same day he also applied for a conditional lease of 440 acres in virtue of the additional conditional purchase referred to.

The local land board disallowed these applications, and their decision was confirmed by the Land Appeal Court, subject to a case which they stated for the opinion of the Supreme Court.

The questions raised for the opinion of the Court were: First, whether the appellant's conditional purchase of the 27th of November, 1873, constituted him the holder of an original conditional purchase within the meaning of sect. 42 of the Act of 1884 (48 Vict. No. 18); secondly, whether sect. 2 of the Crown Lands Act of 1884 preserved to the appellant the right to make additional conditional purchases of adjoining Crown lands to the full area of 640 acres allowed by the repealed Acts, less the area of the freehold portion he originally purchased; and thirdly, whether the appellant, supposing him to be entitled to the additional conditional purchase which he applied for on the 17th of March, 1892, was entitled in virtue thereof to the conditional lease which he applied for on the same day.

The Crown Lands Alienation Act of 1861 repealed the Orders in Council, under which sales of Crown lands had theretofore been made, and provided that they might lawfully be granted in fee simple under and subject to the provisions of that Act, and not otherwise.

By sect. 13 it was enacted that Crown lands, other than certain excepted Crown lands specified, should be open for conditional sale by selection, and that any person might tender to the land agent for the district a written application for the conditional purchase of any of such lands, not less than forty nor more than 320 acres, at the price of 20*s.* per acre, paying to the land agent a deposit of 5*s.* an acre. If no other like application was tendered at the same time, such person was to be declared the conditional purchaser. If there was more than one such application and deposit, the choice between the applicants was to be made by lot.

By sect. 18 it was (amongst other things) required before a grant of the fee simple could be obtained that there should have been three years' bonâ fide continuous residence either of the original purchaser or of his alienee or alienees, and that no alienation should be made by any holder thereof until after his bonâ fide residence thereon for one whole year at the least.

It was by sect. 21 enacted that conditional purchasers of portions of Crown lands under sect. 13 not exceeding 280 acres might make additional selections of lands adjoining the first selection or each other, not exceeding in the whole 320 acres, subject to all the conditions applicable to the original purchase, except residence, and provided that nothing therein contained should prevent the sale of the adjoining lands to any other person before such further conditional purchase should have been made.

By sect. 22 holders in fee simple of lands granted by the Crown in areas not exceeding 280 acres might make conditional purchases of adjoining lands (not exceeding with the lands held in fee simple 320 acres) which should not be subject to the condition of residence applicable to conditional purchases in other cases. The section contains a proviso identical with that found in sect. 21.

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Some modifications of these provisions were made by subsequent legislation. Prior to the year 1884 the area allowed to be purchased was increased from 320 to 640 acres, and the holder of land in fee simple making a conditional purchase of adjoining land under sect. 22 of the Act of 1861 was not to be entitled to the grant in fee simple of such adjoining land unless he should have resided for three years upon the land held in fee simple or on the land conditionally purchased in right thereof.

It is unnecessary to refer to the other changes which were made. In 1884 the Crown Lands Act of that year was passed. By sect. 2 the Crown Lands Act of 1861 and the Acts which had amended it were repealed, subject to a saving provision to which attention will be called. Many of the provisions of the previous Acts were by that statute re-enacted either in their original form or with modifications or additions. Crown lands with specified exceptions were still open for conditional purchase, but the terms of such purchases were somewhat altered. Any person above the age of sixteen was allowed to become a conditional purchaser. The conditions as to residence were made more stringent. Every original conditional purchaser was required to reside for five years on the conditionally purchased land, continuously and bonâ fide living on such land "as the conditional purchaser's usual home without any other habitual residence." This Act, like the Act of 1861, provided for additional conditional purchases; but sect. 22 of the Act of 1861 had no counterpart in the later Act, there being no provision relating to the conditional purchase of adjoining lands by a holder in fee simple of lands granted by the Crown. It was obviously deemed a matter of policy to exclude such holder from the provisions relating to additional conditional purchases and to confine them to original conditional purchasers.

Sect 42, which governs additional conditional purchasers, is in these terms: —

"Any holder of a conditional purchase not exceeding in the Eastern Division six hundred acres or in the Central Division two thousand five hundred and twenty acres may make additional conditional purchases of Crown Lands adjoining the original or any prior additional conditional purchase or each other provided

that the original and such additional conditional purchases do not exceed in the whole six hundred and forty acres in the Eastern Division and in the Central Division two thousand five hundred and sixty acres and that all the conditions and obligations applicable to original conditional purchases be fulfilled by such holder in relation to every such additional conditional purchase except as hereinafter provided And for the purposes of this section it shall be immaterial whether the original or prior additional conditional purchases were made under any of the Acts hereby repealed or under this Act or partly under one and partly under the other Provided that additional conditional purchases may in special areas within the Eastern Central and Western Divisions be made by holders of conditional purchases such purchases original and additional not exceeding one hundred and sixty acres."

It was contended for the appellant that, in right of the first conditional purchase which he had made under the provisions of sect. 22 of the Act of 1861, he might make the additional conditional purchase he claimed to make under the section just quoted.

Their Lordships concur with the Supreme Court in thinking that the appellant is not a holder of a conditional purchase within the meaning of that section and cannot claim the benefit of it.

But it was further contended on his behalf that although sect. 22 of the Act of 1861 is repealed, and there is no corresponding provision in the Act of 1884, yet that the saving proviso of the repealing section of the latter Act (sect. 2) enables him still to make an additional conditional purchase as if sect. 22 remained in force. The words relied on are these :—

"Provided always that notwithstanding such repeal—

"(*b*) All rights accrued and obligations incurred or imposed under or by virtue of any of the said repealed enactments shall subject to any express provisions of this Act in relation thereto remain unaffected by such repeal."

The appellant argued that under the repealed enactment he had a right to make the additional conditional purchase, and that this was a "right accrued" at the time the Act of 1884 was

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passed, and that notwithstanding the repeal it remained unaffected by such repeal."

It is important to consider what a holder in fee simple of Crown land was enabled to do by sect. 22 of the Act of 1861. The section in terms empowers such a holder to make conditional purchases adjoining such lands, provided that the area of the land so conditionally purchased does not, with the lands held in fee simple, exceed 320 acres. But this, though in form it was an enabling power, was in reality rather in the nature of a restriction.

Under sect. 13 "any person" might tender for a conditional purchase of unsold lands. There was nothing, therefore, to prevent an owner in fee simple from tendering for and becoming the conditional purchaser of adjoining lands up to an area of 320 acres. It may be that if some other person tendered for the same lands at the same time sect. 22 would have entitled the fee-simple holder to the preference instead of leaving the matter to determination by lot. But beyond this, that part of sect. 22 which has been quoted cannot be said to have conferred upon him any power which he had not already under sect. 13. What was of importance to him was the provision which followed—that the lands conditionally purchased should not be subject in his case to the condition of residence which was applicable to conditional purchases in other cases.

The substantial effect of sect. 22, therefore, was, that whilst it limited the fee-simple holder of lands to conditional purchases which with the lands so held in fee simple should not exceed 320 acres, it dispensed with the condition of residence on the lands conditionally purchased.

Their Lordships think it fallacious to say that the section in question conferred on the fee-simple holder of land the "right" to make conditional purchases. The only right which, as it appears to them, can be said to have been conferred was that he should be absolved from the condition of residence in the case of lands which he had conditionally purchased. The distinction is important, for it shews how broad the contention of the appellant is. It must, their Lordships think, necessarily go to this extent, that all the enactments of the Act of 1861 of which any one

could before their repeal have taken advantage continue for an indefinite time in force and may notwithstanding the repeal still be taken advantage of. It is difficult to see how the contention for example could stop short of this: that any person entitled to make a conditional purchase under and on the terms of sect. 13 has an accrued right which is reserved to him by the saving proviso. For there is no difference between his position and that of the holder in fee simple, except that the latter may conditionally purchase without the obligation of residence, and perhaps with the right to a preference in case of simultaneous applications for the same land.

It has been very common in the case of repealing statutes to save all rights accrued. If it were held that the effect of this was to leave it open to any one who could have taken advantage of any of the repealed enactments still to take advantage of them, the result would be very far-reaching.

It may be, as Windeyer J. observes, that the power to take advantage of an enactment may without impropriety be termed a "right." But the question is whether it is a "right accrued" within the meaning of the enactment which has to be construed.

Their Lordships think not, and they are confirmed in this opinion by the fact that the words relied on are found in conjunction with the words "obligations incurred or imposed.' They think that the mere right (assuming it to be properly so called) existing in the members of the community or any class of them to take advantage of an enactment, without any act done by an individual towards availing himself of that right, cannot properly be deemed a "right accrued" within the meaning of the enactment.

Even if the appellant could establish that the language of sect. 2 (*b*) was sufficient to reserve to him the right for which he contends, he would have to overcome further difficulties. That enactment only renders "rights accrued" unaffected by the repeal "subject to any express provisions of this Act in relation thereto."

And sect. 3, which is an express provision relating to the preceding section, prescribes that—

"(1.) No application to make any additional conditional

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purchase of Crown lands whatever by virtue of any holding under any of the said repealed Acts shall be entertained or dealt with otherwise than in accordance with the provisions of this Act."

If this enactment is applicable to the appellant's application it would seem fatal to his claim. It is said that it is inapplicable because it refers only to applications by virtue of a holding under the repealed Acts, and that the appellant made his application by virtue of a fee simple grant which was not a holding under the Crown Lands Acts.

The Chief Justice of the Supreme Court held that the words "under any of the said repealed Acts" were to be read as referring to the application to make a conditional purchase, and not as defining the nature of the holding.

Their Lordships think this is probably the true construction. Even if the other construction be the correct one, it is not clear that a holding which has been obtained under the authority of the repealed Acts, and which could only have been obtained by virtue of them, cannot properly be termed a holding under those Acts.

Their Lordships think that the appeal fails so far as regards the application for the additional conditional purchase; and it is conceded that if this be so the claim to a conditional lease must also fail.

Their Lordships will humbly advise Her Majesty that the judgment of the Supreme Court should be affirmed, and that the appellant should pay the costs of this appeal.

Solicitors for appellant: *Bell, Brodrick & Gray.*
Solicitor for respondent: *Randolph C. Want.*

[PRIVY COUNCIL.]

MUNICIPAL COUNCIL OF SYDNEY . . DEFENDANTS;

AND

MARY JANE BOURKE . . . . . PLAINTIFF.

J. C.*
1895
March 27, 28
May 10.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Law of New South Wales—Non-repair of Public Ways—43 Vict. No. 3, s. 67 —Action for Damages.

Held, that the appellants were not liable in damages to the respondent in consequence of their non-repair of the roads vested in them by 43 Vict. No. 3. No statutory obligation in that respect had been imposed upon them, and no right of action had been conferred on the respondent.

Borough of Bathurst v. *Macpherson* (4 App. Cas. 256) explained as enforcing liability in respect of misfeasance in causing a nuisance in a highway.

Cowley v. *Newmarket Local Board* ([1892] A. C. 345) followed as establishing the principle that an action for damages will not lie for non-repair even in cases where non-repair constitutes an indictable breach of duty.

Hartnall v. *Ryde Commissioners* (4 B. & S. 361) overruled.

APPEAL from an order of the Supreme Court discharging a rule nisi (Windeyer J. dissenting) to set aside a verdict for the respondent.

The grounds on which the rule had been obtained were (1.) that the verdict was against the weight of evidence; (2.) that the appellants were not liable for any injury resulting from their non-repair of the roads as alleged.

The action was brought by the widow and administratrix of Charles Bourke, deceased, under 11 Vict. No. 32. The declaration alleged negligence in the appellants' allowing a portion of Kent Street to fall into disrepair, whereby Charles Bourke was thrown from a van whilst driving, and died from the injuries received. A further allegation of the negligent and careless construction of the street was withdrawn. The Chief Justice

* *Present:*—THE LORD CHANCELLOR, LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, and SIR RICHARD COUCH.

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ruled that the appellants were liable for the non-repair; the verdict was for £723, divisible amongst the widow and children. The evidence was to the effect that heavy rain and traffic for some days previous to the accident had made holes in the road, on crossing one of which the deceased had been jolted from his van.

Sir *Edward Clarke*, Q.C., and *Poley*, for the appellants, contended that the Act 43 Vict. No. 3 (see sects. 4 and 67), which vested the public ways of the city of Sydney in the municipal council, did not impose any duty to repair them or to keep them in repair. Even if the earlier Acts relating to the council had imposed any such duty as a binding obligation, the existing and consolidating Act in question did not, on its true construction, continue such obligation. The former Acts, down to and including 20 Vict. No. 36, "required" the council to keep the roads in good order and condition; referring the matter, however, entirely to the discretion of the council by the words "when and as often and in such manner as it shall think necessary." 43 Vict. No. 3, repealed those provisions, and in lieu of "requiring" gave the council by sect. 67 "full power" to improve and maintain them. Further than that, assuming a statutory duty to repair, the Act does not give to a private person who happens to have sustained injury from a breach of such duty a right of action against the council. *Borough of Bathurst* v. *Macpherson* (1) was the basis of the judgments against the appellants in the Court below; but that was a case of misfeasance, and this of non-feasance. *Cowley* v. *Newmarket Local Board* (2) establishes the doctrine of non-liability to an action of this kind for non-feasance even when non-feasance constitutes an indictable breach of duty. Reference was made to the other cases bearing on the subject of the liabilities of corporate bodies in respect of non-feasance and misfeasance respectively—namely, *Mackinnon* v. *Penson* (3); *Couch* v. *Steel* (4); *Young* v. *Davis* (5); *Hartnall* v. *Ryde Commissioners* (6); *Parsons* v. *Vestry of St. Matthew* (7); *Gibson* v. *Mayor*

(1) 4 App. Cas. 256.
(2) [1892] A. C. 345.
(3) 8 Ex. 319.
(4) 3 E. & B. 402.
(5) 7 H. & N. 760.
(6) 4 B. & S. 361.
(7) L. R. 3 C. P. 56.

of Preston (1); *Atkinson* v. *Newcastle Waterworks Co.* (2); *Sanitary Commissioners of Gibraltar* v. *Orfila* (3); *Municipality of Pictou* v. *Geldert* (4); *Oliver* v. *Horsham Local Board* (5).

The respondent did not appear.

1895. May 10. The judgment of their Lordships was delivered by

THE LORD CHANCELLOR:—

This action was brought by the respondent, as administratrix of her deceased husband, Charles Bourke, to recover damages against the appellants in respect of their alleged negligence in allowing a portion of a certain street in Sydney, called Kent Street, to fall into disrepair, whereby the deceased man was thrown from a cart which he was driving, and killed. The sole question of law raised by the appeal is, whether the appellants are liable to an action at the suit of any person sustaining damage in consequence of the highways vested in them being allowed to fall into disrepair, or, in other words, in consequence of the non-repair of highways by them. In the view of the majority of the Supreme Court the case was concluded in the respondent's favour by the decision of this Board in *Borough of Bathurst* v. *Macpherson*. (6) Windeyer J. dissented. He thought that decision did not govern the present case, and that the appellants were entitled to judgment.

Before discussing the scope of the judgment in *Borough of Bathurst* v. *Macpherson* (6), it will be well to consider the question at issue apart from authority. It is admitted that the highway on which the disaster occurred was constructed by the appellants in the first instance quite properly. No complaint of misfeasance is made against them. The sole charge is one of non-feasance: that when the road had fallen into a bad condition, they failed to execute the necessary repairs. If, then, they are liable in the present action, it must be either because that liability has been expressly imposed by some enactment, or because the

(1) L. R. 5 Q. B. 218.
(2) 2 Ex. D. 441.
(3) 15 App. Cas. 400.
(4) [1893] A. C. 524.
(5) [1894] 1 Q. B. 332.
(6) 4 App. Cas. 256.

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Legislature has imposed some duty upon them for the breach of which a right of action accrues to any person injured by it.

The Municipal Council of Sydney is the creation of statute, and such rights or duties as it possesses, or as are incumbent upon it, have been conferred or imposed by the Legislature. By the 6 Vict. No. 3, it was enacted that the town of Sydney should be called a city, and the inhabitants thereof were incorporated under the name of the mayor, aldermen, councillors, and citizens of the city of Sydney. The 82nd section of the same Act provided as follows:—

"That it shall be lawful for the said council and they are hereby authorized empowered and required from time to time and when and as often and in such manner as they shall think proper and necessary to order and cause the several streets roads ways . . . . which now are or hereafter shall be adopted as public or common highways and each and every of them respectively to be altered widened diverted turned or extended paved flagged macadamised or otherwise constructed improved repaired or amended supported and kept in good order and condition with such materials as the said council shall think proper."

The Act of the 6th Vict. was repealed by the 14 Vict. No. 41, but sect. 84 of the later statute re-enacted the provisions of sect. 82 of the earlier Act. It has been said that this enactment required the council as a matter of legal obligation to cause the streets to be repaired and kept in good order and condition. It may be doubted whether the duty imposed is not stated too absolutely. The council is empowered and required from time to time, when and as often and in such manner "as it shall think proper and necessary," to cause highways to be (amongst other things) repaired, supported, and kept in good order and condition. It is certainly open to argument that the extent and nature of the repairs to be effected were left entirely to the discretion of the council, and that the statute did not impose any duty upon it which the law would enforce. It is unnecessary to express an opinion on the point. It cannot, in their Lordships' opinion, affect the question of liability now under consideration.

By the 17 Vict. No. 33, the corporation of Sydney was dissolved; but by sect. 14 of that Act there were transferred to the

commissioners appointed thereunder the powers and authorities possessed by the corporation and the duties imposed on it by the 14 Vict. No. 41. By the 20 Vict. No. 36, the citizens were again incorporated, and the same powers and duties as had been vested in or imposed on the commissioners were transferred to the new council. So matters remained until the passing of the 43 Vict. No. 3, the statute now in force. The Acts to which reference has been made were thereby repealed. The object of the Act was stated to be to consolidate and amend the laws relating to the corporation of the city of Sydney. The 67th section, the first in Part V. of the Act (which is headed "Powers of Council for Regulation of Public Ways") is, so far as material, in these terms:—

"All public ways in the city of Sydney now or hereafter formed shall be vested in the council who shall have full power to alter widen level divert extend construct improve maintain repair and order such public ways and the footpaths thereof and to carry off any water mud or filth therefrom by means of sewers channels or drains or otherwise subject to the provisions of this Act and any by-laws made by the council in that behalf."

There is a marked difference between the language used in the statute and that found in the corresponding provisions of the Acts which preceded it. All public ways are vested in the council, but as regards the repair of them the words are empowering only. Whatever ground there was for contending that under the previous statutes a legal duty to repair was imposed is absent. The council is no longer "required" to keep the roads "in good order and condition" (to quote the words previously used). Their Lordships agree with Windeyer J. in thinking that the statute did not impose on the council a legal obligation to keep the ways vested in them in good repair, unless such duty or obligation arises from the circumstance that the ways are vested in them. Innes J. did not refer to the statutes, but expressed the opinion that the case could not be distinguished from *Borough of Bathurst* v. *Macpherson* (1). Foster J. called attention to the fact that, under the 4th section of the 43 Vict. No. 3, all rights and liabilities existing at the

(1) 4 App. Cas. 256.

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commencement of the Act were to continue to be as binding on and as enforceable by the municipal council as if the Act had not been passed. He then referred to the 1st, the 67th, and the 80th sections of the 6 Vict., under which the original corporation was established, as to which statute he says: "We must look especially for the rights and liabilities transferred and continued to the present municipal council"; and after quoting the 82nd section, he proceeds as follows: "These powers and liabilities appear therefore to be handed down and continued to the present council, and must be read with the 67th section of 43 Vict. No. 3, which vests all public ways in the council and reiterates that they shall have power to alter &c. repair and order them."

Their Lordships find themselves quite unable to agree with the view thus expressed. In their opinion the "rights and liabilities" referred to in the 4th section of the 43 Vict. cannot be construed as including all the powers and duties possessed by the corporation or imposed on it by the repealed statutes. The words of the 4th section are as follows:—

"All contracts appointments and engagements made by the municipal council together with all rights and liabilities existing at the commencement of this Act shall be and continue to be as binding on and as enforceable in favour of the said municipal council as if this Act had not been passed."

The word "liabilities," in the conjunction in which it is found, cannot be regarded as synonymous with or including "duties," or the word "rights" as equivalent to or comprising "powers and authorities." The 43 Vict. is an Act "to consolidate and amend the laws relating to the corporation of the city of Sydney." But if the construction put upon the 4th section by Foster J. were adopted, it would not be a consolidating Act at all, for it would be necessary to look back to all the repealed statutes for the purpose of ascertaining the duties or the powers or authorities of the corporation, and to treat the provisions of those statutes as still in force, even though in the consolidating and amending statute there are enactments dealing with the same subject-matter in different terms. A construction of the section which would involve such consequences is, in their

Lordships' opinion, quite inadmissible, and opposed to sound canons of construction. Not only does the language of sect. 4 not require such an interpretation, but their Lordships think it does not fairly admit of it.

Attention has already been directed to the fact that the provisions of sect. 82 of the 43 Vict., relating to the maintenance of highways, are empowering only, and do not purport to impose a duty. The terms of the section make it manifest that this was the intention of the legislature. The council have conferred on them in a single sentence power to alter, widen, divert, and improve public ways, as well as to "maintain and order" them. It is obvious that the alteration, widening, diversion, or improvement are matters left absolutely to the discretion and judgment of the council, and that there is no binding obligation enforceable by law to do any of these things. It is impossible to hold that whilst as to these matters a power only is conferred and no obligation imposed, the case is different as regards the maintenance of the highways.

There is no doubt, in a certain sense, a duty incumbent on the council to see to the maintenance of the highways. It is for them to exercise the powers conferred upon them by law for the benefit of the community. In these matters they represent the citizens, and ought to have regard to their interests. For their discharge of these duties they are responsible to those whom they represent. The members of the council are the choice of the citizens, and if they do not use their powers well they can be displaced. But if they fail to maintain in good repair the highways of the city, it is not a matter of which the Courts can take cognisance, or which can be the foundation of an action if any citizen should be thereby aggrieved.

It is asserted that, because all public ways are vested in the council, it is bound to keep them in good repair, and is liable to any one injured by their non-repair. This is said to be established by the case of *Borough of Bathurst* v. *Macpherson* (1). Considered apart from authority, it is difficult to see on what this contention rests. Before the 43 Vict. passed, the existing ways were vested in some one, whether it were the owner of the

(1) 4 App. Cas. 256.

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soil over which they had been made or some other body or person. It seems clear that such persons were not merely on that account bound to keep them in repair. How then could the transfer of these ways to the council, or the vesting of them in it, create such an obligation?

Their Lordships pass now to a consideration of the authorities, and especially of the case of *Borough of Bathurst* v. *Macpherson* (1). It will be necessary to examine that case with some minuteness, in order to ascertain the exact scope of the decision. It appears that the borough of Bathurst had constructed a barrel drain under or in proximity to the highway. For what purpose and under what authority this had been done is not stated, and is not material; the construction of the drain was no doubt lawful. The drain having fallen into disrepair, a portion of the highway subsided into it, leaving a hole into which the plaintiff's horse fell as he was riding along the roadway, with the result that he sustained personal injuries. The grounds of the decision are thus stated:—

"It is clear that the hole was caused by an artificial work, viz., the barrel drain which was constructed by the council, and that the accident would not have occurred if that drain had not been made, or if it had been kept in repair so as to prevent the soil adjacent to the excavation made for the barrel drain from washing into it, and forming the hole in question. . . . The question upon these facts is, whether the municipality having constructed the barrel drain was not bound to keep it in a state of repair which would prevent its causing a dangerous hole to be formed in the highway. . . . Their Lordships are of opinion that, under these circumstances, the duty was cast upon them of keeping the artificial work which they had created in such a state as to prevent its causing a danger to passengers on the highway which, but for such artificial construction would not have existed, or, at the least, of protecting the public against the danger, when it arose, either by filling up the hole or fencing it. . . . There would seem to be no substantial difference in the liability between a hole which had been directly made by them, and one which is the indirect but natural consequence of

(1) 4 App. Cas. 256.

the artificial work they had created and had not properly kept."

And the conclusion arrived at is thus stated (p. 267):—

"Their Lordships are therefore of opinion that the appellants, by reason of the construction of the drain, and their neglect to repair it, whereby the dangerous hole was formed, which was left open and unfenced, caused a nuisance in the highway, for which they were liable to an indictment."

The ratio decidendi was that the defendants had caused a nuisance in the highway. It was entirely independent of the questions whether there was an obligation to keep the highway in repair, and whether any person injured by the breach of such a duty could maintain an action. The case was not treated as one of mere non-feasance, and indeed it was not so. The defendants had created a nuisance. Having made the drain, and failed to keep it in such a condition that the road would not fall into it, they were just as much liable as if they had made the excavation without constructing the drain, and the road had consequently subsided and become founderous. If any person other than the defendants had lawfully made the drain, and the same result had ensued, such person would undoubtedly have been liable to an action just as much as if he had dug a hole in or placed an obstruction on the highway, and his liability would have been the same whether the municipality were or were not bound to repair the highway. The owner of land adjoining a highway has been held liable to an action if he digs a hole so close to the highway as to create a nuisance to passengers lawfully passing along it. Why should the municipality be less liable than any other person, in respect of the same acts, merely because the road is vested in them and certain powers or duties in relation to its repair are committed to them?

A study of other parts of the judgment in *Borough of Bathurst* v. *Macpherson* (1) renders it clear that the decision did not in any way depend on the question whether the defendants were liable to an action in respect of the non-repair of the highway, which is the only question in the present case. The declaration in that action contained two counts: the first alleging negligence

(1) 4 App. Cas. 256.

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in and about the care, construction, and management of certain streets; the second alleging that in consequence of the defendants negligently managing and continuing the drain along the streets and neglecting to repair it, the same became and was dangerous to persons lawfully passing over and along the streets. It is pointed out in the judgment that the Supreme Court granted a rule on one ground only, namely: "That the ruling and direction of his Honour the Chief Justice, that the plaintiff could not recover on the second count, on the ground that the defendants were not bound to repair or keep in repair was erroneous." "No question, therefore," it is said, "arises as to the first count." It was the first count alone which alleged negligence in the care and management of the road; the second count was confined to the charge of permitting the drain to become dangerous to persons using the street. Moreover, their Lordships stated expressly that they did "not think it necessary to decide whether it was the intention of the Legislature to throw upon the municipality the obligation of keeping in general good repair the roads and streets placed under its management."

There are no doubt certain dicta to be found in the course of the judgment of the case under discussion which are somewhat broader than was necessary for its decision. Thus it is said: "In their Lordships' opinion there is no principle upon which a distinction in this respect between non-feasance and misfeasance can be supported"—the respect referred to being, that wherever an indictment may be preferred an action will lie. It cannot be denied after the decision in *Cowley* v. *Newmarket Local Board* (1) in the House of Lords that such a distinction does exist, and that in England, whilst in a case of misfeasance in causing a nuisance in a highway, an action can be maintained, no action will lie where the only charge is one of non-feasance in failing to repair it.

Again, reliance is placed on the case of *Hartnall* v. *Ryde Commissioners* (2) (which is said to have been recognised as sound law in subsequent cases) as establishing the proposition that whenever persons can be proceeded against by way of indictment for non-repair an action will lie at the suit of any one sustaining special damage. That case can certainly no longer

(1) [1892] A. C. 345. (2) 4 B. & S. 361.

be relied on as a sufficient warrant for that broad proposition. In *Cowley* v. *Newmarket Local Board* (1) Lord Halsbury, referring to *Hartnall* v. *Ryde Commissioners* (2), said: "Whether that case is quite consistent with the principles upon which cases of the class now before your Lordships have been decided or not it is immaterial to discuss." In the same case Lord Herschell pointed out that in *Hartnall* v. *Ryde Commissioners* (2) the arguments which prevailed in *Gibson* v. *Mayor of Preston* (3) did not appear to have been insisted on, and he added: "It appears to be assumed in the judgment that if the defendants were liable to be indicted for the non-repair of the highway as for a misdemeanour, an action would lie by any one specially aggrieved. No reasons are given for this conclusion, which seems to have been treated as a necessary consequence." In the course of the argument before this Board in a recent case of *Municipality of Pictou* v. *Geldert* (4), which is not without a bearing on the present case, Lord Halsbury said: "While writing on *Cowley's* case I entertained a strong doubt whether *Hartnall* v. *Ryde Commissioners* (2) could be maintained."

There can be no doubt, then, that some of the dicta in *Corporation of Bathurst* v. *Macpherson* (5) can scarcely be supported, in view of the more complete discussion which the subject has subsequently undergone. But they do not affect the authority of that case, for the decision rests on grounds independent of them. The conclusion being arrived at that the defendants had caused a nuisance to the highway for which they could be indicted, it cannot be doubted that it was properly decided that the action lay.

In the series of cases ending with *Cowley* v. *Newmarket Local Board* (1), in which it has been held that an action would not lie for non-repair of a highway, the duty to repair was unquestionable, and it was equally clear that those guilty of a breach of this duty rendered themselves liable to penal proceedings by indictment or otherwise; the only question in controversy was whether an action could be maintained. The ground upon which

(1) [1892] A. C. 345.
(2) 4 B. & S. 361.
(3) L. R. 5 Q. B. 218.
(4) [1893] A. C. 524.
(5) 4 App. Cas. 256.

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it was held that it could not—even where the duty of keeping the roads in repair had been in express terms imposed by statute on a corporate body—was, that it had long been settled that though a duty to repair rested on the inhabitants, subjecting them to indictment in case of its breach, they could not be sued, and that there was nothing to shew that the Legislature in transferring the duty to a corporate body had intended to change the nature or extent of their liability.

In the present case there has been no similar transfer of duty in relation to the repair of the roads. No duty or liability in respect of their repair rested on any one prior to the Acts which committed their management and repair to the corporation of Sydney. It is quite true, therefore, to say that the duty, if there be one, is original and not transferred. But if there be a duty or liability at all, it follows that it can only be because it has been imposed by an Act of the Legislature. Where is it to be found? It has already been pointed out that the 67th section of the 43 Vict. No. 3, which is the only enactment now dealing with the maintenance of public ways, does not impose any duty to repair on the council. It does not provide that they shall be liable to penal proceedings, either by indictment or otherwise, in case of non-repair, nor does it confer a right of action on any person injured thereby. It is to be observed that the Legislature was alive to the necessity of so providing where it was intended that the liability should exist, for in more than one section of Part V. of the Act, of which section 82 may be cited as an example, provision is made that any person offending against the enactment shall be liable to specified penalties, "besides being liable in any civil action for any injury sustained by anyone by reason of such default or negligence." The case of *Municipality of Pictou* v. *Geldert* (1), which has been already mentioned, is worthy of notice in this connection. The following passage, which is very relevant to the present case, occurs in the judgment:—

"It is to be observed further that the statute does not in terms impose any obligation upon the municipality to repair the roads or bridges. It confers upon the council powers and authorities

(1) [1893] A. C. 524.

which extend to those objects; but the powers and authorities are conferred in precisely the same terms with reference to objects with regard to which the powers clearly must be discretionary and not matters of obligation. In the opinion of their Lordships, it is impossible to find in any of the legislative provisions the indication of an intention on the part of the Legislature that a person injured by the mere non-repair of a road or bridge should be entitled to sue the municipality for damages in respect thereof."

Their Lordships, for the reasons which have been indicated, have arrived at the conclusion that the judgment of the Supreme Court cannot be supported. Whether the law is in a satisfactory state, it is not for their Lordships to say. Weighty reasons have been adduced both for and against the liability sought to be established in the present action. It is for the Legislature to determine to which side the balance inclines.

Their Lordships will humbly advise Her Majesty that the order discharging the rule nisi ought to be reversed, and the rule made absolute to enter the verdict for the defendants with costs.

Their Lordships think that the appellants should bear their own costs of this appeal.

Solicitors for appellants: *Barraud, Regge & Jupp.*

[PRIVY COUNCIL.]

J. C.* 1895 *March* 19; *May* 18.

BROWN AND ANOTHER . . . . . DEFENDANTS;

AND

JACKSON . . . . . PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Patent for Improvements in an Old Machine—Infringement.

Where a patent had been granted merely for improvements upon the mechanism of an old and known machine:—

Held, that the patentee's exclusive right thereto could not be permitted to exceed the exact terms of his specification; and that the defendants' improvements which had the same object, but were effected in a manner not strictly corresponding to the specification, were not an infringement of his patent.

APPEAL from a decree of the Supreme Court (March 21, 1894) affirming a decree of the same Court (Sept. 13, 1892), and reversing a decree of the District Court of Colombo (May 2, 1892).

The facts are stated in the judgment of their Lordships.

Moulton, Q.C., *Bousfield*, Q.C., and *J. C. Graham*, for the appellants.

Sir *R. Webster*, Q.C., *Finlay*, Q.C., and *Lawson*, for the respondent.

1895 *May* 18.

The judgment of their Lordships was delivered by

LORD WATSON:—

The respondent, William Jackson, a mechanical engineer carrying on business at Aberdeen, in Scotland, obtained letters patent for the Island of Ceylon, in terms of Ordinance No. 5 of 1889, granting him the exclusive privilege of using an invention relating to "machinery or apparatus to be employed in

* *Present*:—THE LORD CHANCELLOR, LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, and SIR RICHARD COUCH.

imparting the necessary curl to tea-leaf by means of flat or hollow fluted surfaces," for the period of fourteen years from and after the 4th of July, 1881.

The present action was brought by the respondent, in the District Court of Colombo, against the appellants, one of whom is a company registered in England and carrying on business as estate agents and engineers in Colombo, and the other a merchant in Colombo, who acts as assistant manager of the company. In his plaint the respondent charges both appellants with infringement of his patent by importing into, selling, and using in Ceylon, machinery and apparatus for rolling tea-leaves having substantially the same arrangements with those described in his specification; and he craves an injunction and an account of profits. The main and the only defence stated which it is necessary to notice consists in a denial of infringement.

The learned Judge of the District Court found that the patent had not been infringed, and dismissed the action. His decision was reversed on appeal by the late Burnside C.J. and Lawrie J., who remitted the case in order that an injunction might be granted and an account of profits taken. In pursuance of the remit, the district judge issued an injunction and also decerned against the appellants for Rs.40,681, at which sum he assessed the profits derived by them from infringement. On appeal to the Supreme Court that judgment was affirmed; and thereafter the appellants brought the previous judgment of the Appeal Court before that tribunal by way of review, when it was affirmed by a majority consisting of Lawrie and Withers JJ., Bonsor C.J. dissenting.

In considering the question raised by this appeal, there are three different apparatus for tea-rolling to which it is necessary to refer. The first of these is the "Standard" machine, which had been used in the Island of Ceylon without its having been patented for some time before the date of the respondent's invention; the second is his patent machine, known as the "Excelsior"; and the third, the appellants' offending machine, which goes by the name of the "Triple Action Tea Roller." All these machines have precisely the same object—to prepare the leaves of the tea-plant for sale by imparting to them a curl,

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which, before the introduction of machinery, was effected by rubbing the leaves between the palms of the human hand.

The mechanism of all three machines consists of practically the same parts. These may be shortly described as (1.) two plane surfaces (one or both of which may be corrugated), between which the leaves are rubbed, technically known as the upper and lower rolling-tables; (2.) a case or cover, in connection with the upper table, whose function it is to confine the leaves whilst they are operated upon; (3.) arrangements by which the leaves can be fed into the space between the two tables, and are discharged after they have been rolled; and (4.) a revolving shaft, to which the two tables are so geared or connected that, when the machine is at work, they move in opposite directions, the one above the other, and roll or curl the leaves between their surfaces.

Neither the "Excelsior" nor the "Triple Action Tea Roller" is, in any sense, a new machine. They are, both of them, modifications of the mechanism which was employed in the "Standard" machine; and the only point to be determined in this case is, whether the modifications or improvements which constitute the respondent's invention, or a substantial part of them, have been appropriated by the appellants. The novelty and utility of the respondent's modifications or improvements are not challenged. They relate exclusively to the upper section of the apparatus; and, therefore, an inquiry into the infringement of which the respondent complains does not involve any comparison between the parts of his and the appellants' machine other than the upper rolling-table, the case which has already been generally described, and the mechanism by which these are, more or less directly, connected with each other, and with the actuating shaft. In all three machines the upper rolling-table and the case rest upon, or are in some manner connected with, a stage or framework which is directly geared to and actuated by the shaft.

In the "Standard" machine, which represents the state of public knowledge in Ceylon at the date of the respondent's patent, the upper rolling-table was rigidly connected with the stage or framework, which was moved backwards and forwards in a line nearly at right angles to the direction in which the lower

table was similarly moved. In one respect the upper mechanism differed materially from the device adopted either by the respondent or by the appellants. The case for retaining the leaves during the process of rolling was made to cover the upper table, and was carried along with it by the table when in motion, fresh leaves being introduced through an aperture in the top of the case, which was fitted with a lid.

In the respondent's patent machine the case is made open at the top, and is detached from the upper rolling-table, being rigidly connected with the stage or framework. The table is placed inside the case, but not connected with it or with the stage, and, within the case, it is allowed an inch or two of free play all round. Accordingly, when the machine is at work the upper table does not move until it comes into contact with and is pushed or impelled by the inner surface of the case.

In the appellants' apparatus a case, open at the top, is also used, its form being in no material respect different from that of the case which is employed by the respondent in his patent machine. But the appellants' rolling-table is not detached, and is not allowed to have free play in any direction. It is rigidly connected with the stage or framework, and is directly actuated by the revolving shaft. It is altogether independent of, and derives no motion or impulse from, the surrounding case.

The claim made by the respondent in his specification, which the appellants have been held to have infringed, is in these terms: "The arrangement of transmitting motion to the top rolling surface through the case or jacket surrounding it whereby such rolling surface is left free as regards vertical movement from the mechanism operating it."

The respondent's patent being, not for a new machine, but for improvements upon the mechanism of an old and known machine, his exclusive right cannot be permitted to exceed the exact terms of his specification.

Assuming that the words "case or jacket" in the claim just quoted mean the case which their Lordships have already described, it appears to them to be clear that the appellants' machine does not violate the exclusive privilege of the respondent. No motion is transmitted to the appellants' rolling-table

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through that case, and the table has not free play in any direction, although it may be vertically raised or lowered, when requisite, by means of mechanism introduced for that purpose by the appellants.

The respondent, therefore, cannot succeed in this action unless he can shew that, upon a fair construction of his specification, the words "case or jacket" include, not only the enveloping case already described, but the whole stage or framework of the upper table directly connected with the shaft. If that were what the respondent really meant, his claim would hardly cover the appellants' arrangement, because in it the rolling surface is not in any proper sense "left free as regards vertical movement from the mechanism operating it." But that the respondent had no such meaning in view is, in their Lordships' opinion, clearly apparent from the terms of the specification, taken in connection with the drawings to which it refers.

Their Lordships will therefore humbly advise Her Majesty to reverse the judgments appealed from, and to dismiss the respondent's suit, with costs in both Courts below. The respondent must bear the costs of this appeal.

Solicitors for appellants: *Hollams, Sons, Coward & Hawksley.*
Solicitors for respondent: *J. H. & T. Y. Johnson.*

[PRIVY COUNCIL.]

LONDON AND SOUTH AFRICAN EXPLORATION COMPANY, LIMITED . . } PLAINTIFFS;

AND

DE BEERS CONSOLIDATED MINES, LIMITED . . . . . } DEFENDANTS.

J. C.* 1895 March 21; May 18.

ON APPEAL FROM THE SUPREME COURT OF THE CAPE OF GOOD HOPE.

Lease—Improvements—Permanent Buildings erected by Lessee—Right of Removal.

Where a lessee being entitled by the terms of his lease to remove all such improvements as should be capable of removal without injury to the land itself, pulled down a brick building which he had erected on the land demised and removed the materials except those composing the stone foundations beneath the soil:—

Held, that this proceeding was authorized by the lease, and in accordance with the lessee's common law right under the Roman-Dutch law.

APPEAL from a decree of the Supreme Court (Dec. 12, 1893), reversing a decree of the High Court of Griqualand (Sept. 25, 1893).

The facts and the material terms of the lease in question are stated in the judgment of their Lordships.

Cohen, Q.C., and *E. S. Ford*, for the appellants, contended that on the true construction of the lease the respondents had agreed to surrender all buildings and erections on the land demised, and that that expression included such buildings as they had themselves erected. The buildings in question did not come within the meaning of the term "improvements" which could be removed without injury to the land itself. Apart from the terms of the lease, the buildings in question, having been annexed by the respondents to the soil of the land demised, became the

* *Present*:—THE LORD CHANCELLOR, LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, and SIR RICHARD COUCH.

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property of the appellants in the same manner and to the same extent as the land itself. That would be so under English law: see *Wake* v. *Hall* (1) and *Whitehead* v. *Bennett* (2). Under Roman-Dutch law, also, the buildings belonged to the owner of the land, and the respondents were not entitled to pull them down and remove for their own benefit the materials of which they were composed. Such right is limited to detachable materials, and does not extend to what has become part of the immovable property. [Reference was made to Sandar's Justinian, bk. ii. tit. 1 par. 30; *Swarts* v. *Landmark* (3); *Kimberley Building Society* v. *Kimberley Borough* (4); Van der Keessel, thesis 213; *Barnard* v. *Colonial Government* (5); *Abrahams* v. *Isaacs* (6); *Bellingham* v. *Bloommetje* (7).]

Finlay, Q.C., and *G. Lawrence*, for the respondents, were not heard.

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May 18.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN:—

The respondents, who were defendants in the action, were tenants of a plot of ground in Dorstfontein, in the Division of Kimberley, under a lease from the appellants for a term of years which expired in 1893. Before the expiration of the term they removed some buildings of a permanent character which they had erected during their tenancy. The appellants claimed damages for the removal, and the action was brought to enforce the claim. The High Court of Griqualand held that the removal was in contravention of the law of the Colony, and not authorized by the terms of the lease. Accordingly they gave judgment for the appellants, awarding £500 for damages. On appeal, the Supreme Court of the Colony of the Cape of Good Hope reversed this decision, and entered judgment of absolution from the instance. The judgment on appeal was pronounced by Sir J. H. de Villiers C.J.

(1) 7 Q. B. D. 295, and in appeal 8 App. Cas. 195, 203.
(2) 27 L. J. (Ch.) 474.
(3) 2 Juta, 5.
(4) 7 Juta, 149.
(5) 5 Juta, 125.
(6) 5 Juta, 183.
(7) Buchanan (1874) p. 36.

In a very learned and elaborate opinion, in which the other members of the Court concur, the Chief Justice discusses the law of the Colony in reference to the ownership of materials annexed to the soil by a person rightfully or wrongfully in temporary possession of land, and he states the conclusions at which the Court had arrived, differing on several important points from the learned judges of the Court below. Among those conclusions is a proposition to the effect that "In the absence of special agreement a lessee annexing materials, not being growing trees, to the soil, is presumed to do so for the sake of temporary and not perpetual use, and as between himself and the owner of the land, does not, during his tenancy, lose his ownership in the materials." "He may," adds the Chief Justice, "before the expiration of his term, disannex the materials and remove them from the land, subject to the rights of the landlord to obtain security against any serious damage to the land, and to interdict any depreciation of his tacit hypothecation for unpaid rent. . . Improvements necessary for the protection or preservation of the land may not be removed even during the tenancy, but, on the other hand, they must be compensated for." The Chief Justice then proceeds to inquire whether the effect of the lease was to deprive the respondents of their common-law right. He answers that question in the negative, and shews from the lease itself that the removal of the buildings in question was authorized by the very terms and conditions of the bargain between the parties.

A most able argument on the Roman-Dutch law in force in the Colony was addressed to their Lordships by Mr. Cohen in support of the view which commended itself to the High Court of Griqualand. Their Lordships, however, see no reason to think that the conclusions at which the Supreme Court arrived are in any respect erroneous. In their Lordships' opinion, it is not necessary to say more on this part of the case, because it appears to them, as it appeared to the Supreme Court, that provisions in the lease, which were certainly not forbidden by law, authorized the respondents to remove the buildings as they did.

The lease was dated the 7th of December, 1888. The land demised, which at the time was "simply grazing ground, ordinary

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veldt," comprised about six acres. The term was to be five years from the 1st of May, 1888, with an option of renewal for a further term of five years. The yearly rent was £120 payable quarterly in advance. It was stipulated that the lessees should within three calendar months "properly and effectually enclose" the land demised, and that they should not "at any time use it for any other purpose than that of a slaughter place and kraal with the necessary buildings for the same." There was a covenant on the part of the lessees against assigning or underletting without consent, and also a covenant that on the expiration or sooner determination of the term they would surrender "the said plot of ground with all buildings and erections thereon in good repair and condition." But this covenant was qualified by the following proviso: "Provided always that if no rent shall be due and unpaid the lessees their successors and assigns shall be at liberty during their tenancy to remove all such improvements (save and except boundary fences) as shall be capable of removal without injury to the land itself." Lastly, the lease contained a reservation of minerals and mineral rights, and a declaration that in case the land should be required for mineral purposes the lessors might terminate the lease on giving six months' notice to the lessees, who on their part agreed to give up possession, "receiving such reasonable compensation for the permanent buildings and erections thereon from the lessors" as might be agreed upon or settled by arbitration.

It appears that with the consent of the lessors the land was underlet to or occupied by one Grewer as a cattle kraal and shambles. It was properly enclosed with a boundary fence, and Grewer erected upon it at a cost of about £650 a brick building, with stone foundations as deep in some parts as eighteen inches. The option of renewal was not exercised. And shortly before the expiration of the term, no rent being then due and unpaid, the buildings were pulled down and all the materials were removed, except those composing the foundations which were covered up with soil.

On the construction of the lease it seems to their Lordships that only two questions can arise: Were such buildings as were in fact erected on the land "improvements" within the meaning

of the proviso? And if so, were they "capable of removal without injury to the land itself"?

In the argument before their Lordships, as in the argument before the Supreme Court, it was sought to confine the term "improvements" to erections not affixed to the soil. But that is not the natural or proper meaning of the expression, which seems to be more applicable to something attached to and forming an integral part of the thing improved than to something which is merely added to it or placed upon it without annexation or union. Nor is the meaning suggested by the appellants, as it seems, "the ordinary meaning of the term 'improvements' as applied to land" in the Colony. So says the Chief Justice; and his statement on the point was not impugned in the argument before their Lordships. Besides, it is to be observed that the expression is found in a proviso, which is a qualification of a covenant on the part of the lessees to surrender the land "with all buildings and erections thereon in good repair and condition." The buildings and erections referred to in the covenant must be buildings and erections affixed to the soil. The proviso must apply to improvements of the same class and character. Otherwise it would obviously be out of place, if not unmeaning.

There remains the question as to the meaning of the words "without injury to the land itself." It is much the same question over again. The appellants contend that any disturbance of the soil is injury to the land itself, and that therefore, according to the terms of the lease, no building could be removed unless it were capable of removal without disturbing the soil. But the exception of boundary fences shews that that cannot be the meaning of the expression in the present case. A fence sufficient to keep in cattle pastured on the veldt and collected for slaughter—animals probably not more gentle in disposition or more patient of control than English cattle—could hardly be removed without considerable disturbance of the soil. And therefore, even without the light afforded by the law of the Colony as expounded by the Supreme Court, the words must mean something more than what the appellants contend for. The injury in contemplation must have been injury of a nature

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substantial or serious. It is not necessary to consider what amount or degree of injury ought to be regarded as substantial or serious, because in the present case there is no evidence to shew that removal of the buildings would necessarily have caused any injury at all. The principal witness for the appellants stated that he "could have easily taken away the foundations and restored the ground to its former condition."

The last clause of the lease does not, in their Lordships' opinion, advance the argument on behalf of the appellants. It does not prevent the lessees from removing any buildings which they might be entitled to remove under the terms of the lease. It merely gives them the option of leaving their buildings and claiming compensation for them in the event of the lease being prematurely determined for mining purposes.

For these reasons, their Lordships are of opinion that the decision of the Supreme Court is right; and they will accordingly humbly advise Her Majesty that the appeal should be dismissed. The appellants will pay the costs of the appeal.

Solicitor for appellants: *A. E. Sydney.*

Solicitors for respondents: *Hollams, Sons, Coward & Hawksley.*

[HOUSE OF LORDS.]

ALEXANDER KNOX McENTIRE AND JOHN ARTHUR MACONCHY . . . } APPELLANTS;

AND

CROSSLEY BROTHERS, LIMITED . . RESPONDENTS.

H. L. (I.)
1895
May 13.

Bill of Sale—Hiring Agreement, Construction of—Option to Purchase—Property in Goods—Bankruptcy—Bills of Sale Acts.

By an agreement in writing the "owners and lessors" of a gas-engine agreed to let, and the "lessee" agreed to hire, the engine at a rent to be paid by instalments amounting in all to £240; upon payment in full the agreement to be at end and the engine to become the property of the lessee, but until payment in full to remain the sole and absolute property of the lessors. It was also agreed that in case of failure to pay any of the instalments or if the lessee should become bankrupt the lessors might elect either to recover the full balance remaining due, or instead to resume possession of the engine and sell it and, after retaining out of the purchase-money all expenses and the balance remaining due, pay the surplus (if any) to the lessee. Provided that if the lessors should see fit to resume possession of the engine without selling, the loss to them occasioned by the lessee's non-performance of the agreement should be borne by him, and in case of bankruptcy the lessors should be entitled to prove against his estate for that loss as liquidated damages.

The lessee paid the first instalment and the engine was placed on his premises. While it was still there he became bankrupt, some instalments being overdue. The lessors having taken no steps to recover the balance due or to sell:—

Held, that upon the true construction of the agreement the property in the engine never passed to the lessee, but remained in the lessors; that the transaction was therefore not within the Bills of Sale Acts, and that the lessors were entitled to an order of the Bankruptcy Court for delivery of the engine to them.

The decision of the Irish Court of Appeal ([1894] 1 I. R. 235) affirmed upon the above ground.

THIS appeal turned entirely on the construction of an agreement made on the 23rd of June, 1892, in the following terms:—

"Between Crossley Brothers, Limited, engineers, millwrights, and machinists of Openshaw, Manchester, in the county of Lancaster (hereinafter called 'the owners and lessors') of the one part, and Mr. Thomas Frederick Peel, cooper, 6 Cathedral Place,

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Limerick (hereinafter called 'the lessee' of the other part). The owners and lessors hereby agree to let to the lessee and the lessee hereby agrees to take and hire from the owners and lessors one 'Otto' gas-engine of fourteen horse-power with all fittings and appurtenances complete as specified in the trade catalogue of the owners and lessors, delivered and fixed complete in Limerick (with self-starter) on the following conditions:—

"The lessee shall and will pay to the owners and lessors as and for rent for the said 'Otto' gas-engine the following sums (that is to say) £60 (sixty pounds) cash before delivery, and the balance in eight equal and consecutive quarterly payments, which said sums so agreed to be paid as aforesaid amount in the aggregate to the sum of £240 (two hundred and forty pounds), and the lessee agrees to take all proper care of the said 'Otto' gas-engine, and so long as any of the said sums remain unpaid to pay the rent payable by the lessee in respect of the premises upon which the said engine may for the time being be within fourteen days after the same may be payable, and on demand produce to the owners and lessors the receipt in respect of the same, and to allow plates to be fixed and any number or mark put on the said 'Otto' gas-engine with the name of the said company as owners and lessors thereon, and to allow such plates numbers and marks to remain so fixed and put thereon, and that the lessee will permit the owners and lessors or their agent to have access to the said engine if they should so require, and will not in any way sell assign sublet or otherwise part with the possession of the said 'Otto' gas-engine or assume the ownership thereof or remove the same from one building to another without first informing the owners and lessors of such intended removal and receiving their consent in writing so to do, so long as any of the said sums shall remain unpaid, and will not make any alteration or addition to the said 'Otto' gas-engine or allow the same to be made without the consent in writing of the owners and lessors, and that upon payment by the lessee of the several sums aforesaid then this agreement shall be at an end and the said 'Otto' gas-engine shall become the property of the lessee as purchaser thereof for the said sum of £240 so to be paid as aforesaid, but until the said several sums shall

have been fully paid together with insurance repairs (if any) and other costs and expenses legal or otherwise connected therewith the said 'Otto' gas-engine shall remain the sole and absolute property of the owners and lessors, it being hereby expressly declared and agreed that the said 'Otto' gas-engine is only let on hire to the lessee until all sums of money due under this agreement are paid.

"And in case of failure in payment of any of the above-mentioned sums or in case the lessee his executors administrators or assigns shall during the continuance of this agreement be adjudged bankrupt, or file a petition for liquidation or make a composition with or any assignment for the benefit of his creditors or suffer his effects to be taken in execution, or give a bill of sale, or on the breach of any of the covenants and conditions herein contained, the full balance of the said sum of £240 required for purchase of the said engine shall at the election of the owners and lessors at once become payable to and be recoverable by them, who however instead of seeking to recover such balance may if they think fit seize and resume absolute possession of the said engine wherever the same may be, and for this purpose if necessary may break into the premises of the lessee where the said engine may from time to time be or be reasonably thought to be, and sell the same in such way as they may think fit, and the several sums which shall have been paid by the lessee shall be forfeited to the owners and lessors, and out of the purchase-money to arise from any sale of the said 'Otto' gas-engine the owners and lessors may reimburse themselves and pay all the costs and expenses incurred in such seizure and sale or in connection therewith, and after retaining the difference between the instalments so actually paid by the lessee under the provisions aforesaid and the said sum of £240 pay the surplus (if any) unto the lessee his executors administrators or assigns or to whom he or they shall direct. Provided always and it is hereby agreed and declared that in case the owners and lessors shall see fit to resume the possession of the said 'Otto' gas-engine under this agreement without proceeding to a sale then the loss occasioned to them by reason of the non-performance of the provisions of this agreement on the part of the lessee shall be borne

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by the lessee, and in case of bankruptcy the owners and lessors shall be entitled to prove against his estate for the same as and for liquidated damages. And lastly it is hereby agreed that the owners and lessors shall insure the above 'Otto' gas-engine against damage by fire for the sum of £240 for their own security, the premium for the same being paid by the lessee, but in case of fire if the sum received shall be over the balance of the said sum of £240 then remaining unpaid to the owners and lessors the surplus shall be paid to the lessee."

On the 30th of June, 1893, Peel was adjudicated bankrupt, the gas-engine being on his premises. The gas-engine having been seized by the assignee in bankruptcy, Crossley Brothers, the present respondents, applied to the Court for an order that it be delivered up to them, the bankrupt having paid £60 on the 27th of June, 1892, and nothing since.

Judge Boyd refused the motion with costs, and ordered the engine to be sold for the benefit of the creditors. This order was discharged by the Court of Appeal in Ireland (Lord Chancellor Walker, Fitzgibbon and Barry L.JJ.), who ordered the engine to be given up to the respondents as the true owners thereof (1). The assignees appealed.

May 10, 13. *Moulton* Q.C. and *M. Muir Mackenzie* (*Robert Doyle* of the Irish Bar with them) for the appellants:—

The transaction is not one of hiring, but of sale and mortgage by the purchaser. The mortgage, being of a chattel, is a bill of sale, and not being registered is void under the Bills of Sale Acts. There is no power to return the machine, and by the agreement the so-called hirer must pay the whole purchase-money. This distinguishes the case from that of *Helby* v. *Matthews* (2), recently argued in this House. The Court will look to the essence and not merely to the form of the agreement: Courts have found no difficulty in construing instruments in a manner contrary to the expressed intention in order to give effect to the real intention. What the parties sought to establish was the relation of seller and purchaser, the former to have a charge on the chattel for the unpaid purchase-money. But as that charge is not registered

(1) [1894] 1 I. R. 235. (2) Post, at p. 471.

as a bill of sale, it is invalid. In the case of *In re Watson* (1), a transaction which purported to be a sale of personal chattels, followed by a hire and purchase agreement, was construed by the Court of Appeal to be in reality a bill of sale. So in *Coburn* v. *Collins* (2) an agreement for sale of a business by which the purchase-money was to be paid at a future date, and the vendors were to have a lien or charge for the purchase-money and interest, was construed by Kekewich J. as a bill of sale, and not being registered was declared void. In *Lee* v. *Butler* (3), which was a case under the Factors Act, 1889, the Court of Appeal construed a document very similar to the present as "plainly an agreement for purchase."

[The provisions in the agreement relied on by the appellants are sufficiently referred to in the judgments.]

Sir *R. E. Webster* Q.C. and *C. A. Russell* for the respondents were not heard.

LORD HERSCHELL L.C.:—

My Lords, I confess this appears to me to be a very plain case. The agreement between the parties must be construed in precisely the same way as if there had been no bankruptcy at all. Apart from any statutory provision, the assignees in bankruptcy only succeed to the rights of the bankrupt, and have no higher or greater rights. The assignees, of course, could not successfully contend that under this agreement Mr. Peel could have insisted, as against Messrs. Crossley, on retaining possession of this engine without paying the sum, or what was necessary to make up the sum, of £240; and therefore at common law the assignees would be in no better position. There are, so far as I know, only two statutory provisions which in such a case as this could give the assignees a better right than the bankrupt. One of them is the provision of the Bankruptcy Act known as the reputed ownership clause—that is to say, that if the goods, although the goods of Messrs. Crossley, were in the reputed ownership of the bankrupt, though the bankrupt could not have

(1) 25 Q. B. D. 27. (2) 35 Ch. D. 373.
(3) [1893] 2 Q. B. 318.

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claimed to have retained them as against Messrs. Crossley, the assignees can. That was the question argued in the Courts below. The present appellants there insisted upon their rights to the engine under the reputed ownership clause of the Bankruptcy Act. That was decided against them. They have abandoned any claim to it on this appeal, and therefore the provisions of the Bankruptcy Act are out of the case.

The only other statute which could give the assignees a better right under the bankruptcy is the Bills of Sale Act; and under that Act, where a bankrupt has transferred the property in his goods to another person, or given that other person rights in the nature of rights of property over them, if the goods remain in his possession and he becomes bankrupt his assignees in bankruptcy can claim the goods, disregarding all rights which he has given, unless the instrument carrying out the transaction (if it has been carried out by an instrument) has been registered as a bill of sale.

But, of course, in order to make out that the assignees have a title to this engine under the Bills of Sale Act, it is absolutely essential to prove that the property in the engine, at some time or other, passed to the bankrupt. If the property never passed to the bankrupt he can never have conveyed it or assigned it or given the right to seize, or have given any of the rights over it within the meaning of the Bills of Sale Act. The Bills of Sale Act relates to assurances or assignments or rights to seize given or conferred by the person who owns the property. Therefore, if the true view is that the property in this gas-engine has never been out of Messrs. Crossley, the bankruptcy of Peel cannot affect their title in any manner or shape, and the property must still remain in them, and all the rights under the agreement must remain. Now that necessitates an examination of the agreement. It seems to me that the only question in this case is: Did the property in this gas-engine pass at any time from Messrs. Crossley to Peel?

Coming then to the examination of the agreement, I quite concede that the agreement must be regarded as a whole—its substance must be looked at. The parties cannot, by the insertion of any mere words, defeat the effect of the transaction as

appearing from the whole of the agreement into which they have entered. If the words in one part of it point in one direction and the words in another part in another direction, you must look at the agreement as a whole and see what its substantial effect is. But there is no such thing, as seems to have been argued here, as looking at the substance, apart from looking at the language which the parties have used. It is only by a study of the whole of the language that the substance can be ascertained. [His Lordship read the agreement down to the words, "it being hereby expressly declared and agreed that the said Otto gas-engine is only let on hire to the lessee until all sums of money due under this agreement are paid."]

My Lords, I stop there to observe that the parties have in terms expressed the intention that the property in this gas-engine should not pass until all the instalments have been paid. Upon an agreement to sell it depends upon the intention of the parties whether the property passes or does not pass. Here the parties have in terms expressed their intention, and said that the property shall not pass till the full purchase-money is paid. I know of no reason to prevent that being a perfectly lawful agreement. If that was really the intention of the parties, I know of no rule or principle of law which prevents its being given effect to. I quite agree that if, although the parties have inserted a provision to that effect, they have shewn in other parts of the agreement, by the language they have used or the provisions they have made, that they intended the property to pass, you must look at the transaction as a whole; and it might be necessary to hold that the property has passed, although the parties have said that their intention was that it should not, because they have provided that it shall. No doubt any provisions which were inconsistent with the intention that the property should not pass would be given effect to in preference to a mere expression of intention in words—that is a proposition which I should not dispute for a moment; and if the appellants could have pointed here to any provisions in this deed inconsistent with the intention that the property should remain in the vendors, I think they might very likely have succeeded, notwithstanding that the parties had in terms said what their intention was.

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My Lords, if the matter of intention were even doubtful, great weight would be given to what the parties have stated their intention to be. But in the present case I am unable to find any provision in this deed inconsistent with the intention which the parties have said was theirs. If the instalments are not paid as provided for, or if the hirer, or intended purchaser, or whatever he may be called, becomes bankrupt, then there is a provision in the agreement as to what shall happen: Messrs. Crossley may in that case elect to sue for the remainder of the instalments, to treat them all as at once payable and sue for them. No doubt if they take that course they elect to have the purchase then completed. They could not sue for the purchase-money and insist that the property in the goods, the price of which they were suing for, had not passed. But that is merely one of certain alternative courses which are open to Messrs. Crossley. They may, instead of suing for the balance of the price and treating it then and there as a sale at that price then due, resume possession. I would observe that in all the subsequent clauses, which clearly contemplate the property being in them, the only word used with reference to their action is "resuming possession"—nothing is said about any transfer of the property. It is assumed that on the resumption of possession there will be in them both possession and property.

On the resumption of possession they may pursue one of two alternative courses. They may, if they like, sell; and if they sell and if on the sale the engine produces more than enough to pay everything that would be due in any event to Messrs. Crossley, and leaves a surplus, then Messrs. Crossley undertake by the agreement to pay that surplus to Mr. Peel, the bankrupt. But that is not the only course which they may pursue. It is absolutely at their option whether they do that or not. They may simply resume possession of the engine, and, having resumed possession, they may sue the hirer, or whatever the bankrupt should be called—I will call him the hirer to prevent using several words—for the damages they have sustained by the non-performance of the provisions of this agreement; or if he becomes bankrupt they may prove for them as liquidated damages. Of course, the distinction is as well settled as it

possibly can be between a debt for the price of goods the property in which has passed, and an action of damages for breach of a contract to buy and pay for the goods. In the former case, of course, the debt due is the balance of the price, the purchaser keeping the goods. In the other case the vendor retains possession of the goods; but he sues for the damages that he has sustained by the purchaser not carrying out his agreement to buy as stipulated. This agreement provides that he may either sue for them if there has not been a bankruptcy, or prove for them if there has been a bankruptcy. But suing or proving for those damages implies of course the property as well as the possession being still in the vendor. So far from finding in this agreement anything that runs counter to the expressed intention of the parties that the property should throughout remain in the vendor, everything to my mind seems to point in that direction.

Great reliance was placed by the learned counsel, who has addressed your Lordships with zeal and ability on behalf of the appellants, upon the provision with reference to the sale of the engine. He said, "This is putting the vendors really in the position of mortgagees." It seems to me not to be a position inconsistent with the provision in which the parties stated what was their intention. There seems to me nothing inconsistent with that in an agreement by the vendor that if he does resume possession, and if he does sell, and if he does on the sale get more than the stipulated price, he will not keep it, but will pay the balance to the intending purchaser: that is a perfectly lawful agreement for the parties to come to. But it is to be observed that if he sells and the engine produces on the sale less than what would be due from Mr. Peel, there is no provision that he can recover the balance. His only course, if he contemplated such a result, would be to determine not to sell, but to keep possession and to sue for damages for breach of contract, or to prove for such damages.

Therefore, when the agreement is looked at as a whole, I can find nothing to prevent effect being given to the expressed intention of the parties that the property in this engine should not pass. I think they really intended it. I think it is perfectly natural that they should have intended it. No doubt to

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some extent that may have the effect of giving to the sellers a security such as they would have as mortgagees. It may to some extent, as I say, give them that security; but I know nothing to prevent such a contract as that being made or having full effect given to it. If a contract of that description is within the mischief of the Bills of Sale Act, then the Bills of Sale Act needs amendment. I do not say whether it is so or is not; but it seems to me impossible to bring this case within the Bills of Sale Act because the transaction may bear a resemblance to a transaction which would be within it on the ground that it is within its mischief, when the initial step to bringing the Bills of Sale Act into operation at all fails, namely, that there should have been an assurance, or an assignment, or a licence to seize, or any of the other matters referred to in the Bills of Sale Act given by the bankrupt to some other person.

My Lords, with regard to the case of *Coburn* v. *Collins* (1), upon which reliance was placed, that seems to me to be a very different case from the present one. That was an agreement for the sale of a business the price of which was to be paid at a future time. There was no agreement between the parties in that case that the property should not pass at once. There were none of the stipulations which one finds here as to the use of that which was the subject of the agreement to sell. In this case the intending purchaser cannot sell, assign, sublet, or even remove from one building to another, this gas-engine, the property of which is supposed to be in him; in *Coburn* v. *Collins* (1) it was the sale of a business which the purchaser was intending to continue, he selling the stock-in-trade—two contracts of a very different nature. In the next place there, in terms, the vendors were to have a lien or charge until the full price was paid—a lien or charge implying that the property had passed to others, for a man does not have a lien on his own property or a charge either. Therefore, in that case there were provisions in the agreement which pointed to the intention being that the substance of the transaction was a sale in which the property passed with a security, eo instanti, given by the purchaser to the vendor. That decision does not seem to me to be in the slightest degree inconsistent with the

(1) 35 Ch. D. 373.

conclusion at which your Lordships have arrived in the present case.

I move your Lordships that this appeal be dismissed with costs.

LORD WATSON :—

My Lords, I agree with your Lordships that in this appeal no cause has been shewn for disturbing the judgment of the Appeal Court in Ireland.

As is usual in cases of this kind, we have heard a great deal in the course of the appellants' argument of the necessity of attending to the substance of the agreement which we have to construe. My Lords, that is a canon of construction which is applicable to all agreements; but it must always be borne in mind that the substance of the agreement must ultimately be found in the language of the contract itself. The duty of a Court is to examine every part of the agreement, every stipulation which it contains, and to consider their mutual bearing upon each other; but it is entirely beyond the function of a Court to discard the plain meaning of any term in the agreement unless there can be found within its four corners other language and other stipulations which necessarily deprive such term of its primary significance.

My Lords, in this case the substance of the agreement does not admit of much doubt. Although the words "lessors" and "hirer" are used and the word "rent" also occurs, it is perfectly plain that the agreement is one of sale and purchase, and nothing else. To that extent, my opinion entirely coincides with that expressed by the learned judge of first instance.

But a finding that the contract in this case is one of sale and purchase is not sufficient for the argument of the appellants; because it does not in the least follow that, because there is an agreement of sale and purchase, the property in the thing which is the subject-matter of the contract has passed to the purchaser. That is a question which entirely depends upon the intention of the parties. The law permits them to settle the point for themselves by any intelligible expression of their intention.

If there be one point on the face of this contract clearer than another, it is, that the intention of the parties was that the seller

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should not part with his dominium over the thing which he was selling, and that its property should not become vested in the purchaser until the last farthing of the price was paid. If there had been in the deed language which shewed that the parties were using those expressions inadvertently, or that they had entered into other stipulations which were in substance contrary to the expressed intention, the case would have been otherwise. They might, for instance, have given power to the purchaser to exercise a right which implied his dominium before the contractual term for the passing of the property arrived. But there is no case of that kind here. There are no such stipulations to be found in the agreement. The whole stipulations of the agreement appear to me to be in entire conformity with the expressed intention of the parties; and I may add this observation, that in my opinion the remedies given to the unpaid vendor are far more appropriate to the case of an undivested seller than to the case of a mortgagee, which was said to be his true position.

My Lords, I need not, after the criticism of my noble and learned friend the Lord Chancellor, enter any further into the terms of this contract. I shall only say in conclusion, that I find it impossible to attach the construction to it which was contended for by the appellants without taking out of the contract plain words which are to be found in it and inserting in lieu of them words to a different effect which are not to be found in it.

LORD ASHBOURNE:—

My Lords, I entirely concur. Notwithstanding the ingenious arguments addressed to your Lordships in this case on behalf of the appellants, and notwithstanding the respect I entertain for the ability and experience of Judge Boyd I am clearly and strongly of opinion that the decision of the Court of Appeal in Ireland was correct.

The question turns upon the construction of this agreement, not upon a suggestion that may be drawn from the construction of other agreements; and I can see no considerations of public policy, and no considerations of inconvenience in the adminis-

[HOUSE OF LORDS.]

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AND

MATTHEWS AND OTHERS . . . . . RESPONDENTS.

Factor—Sale of Goods, Agreement for—Possession of Goods under Agreement with option to buy—Hire and Purchase Agreement—Disposition of Goods by Person having option to Purchase—"Person having agreed to buy Goods"—Factors Act 1889 (52 & 53 *Vict. c.* 45) *s.* 9.

The expression in the Factors Act 1889 s. 9 "a person having agreed to buy goods" means a person who has bound himself by agreement to buy, and does not include a person who has an option to buy, the owner being bound to sell if that option is exercised.

The owner of a piano agreed to let it on hire, the hirer to pay a rent by monthly instalments, on the terms that the hirer might terminate the hiring by delivering up the piano to the owner, he remaining liable for all arrears of hire; also that if the hirer should punctually pay all the monthly instalments, the piano should become his sole and absolute property, and that until such full payment the piano should continue the sole property of the owner. The hirer received the piano, paid a few of the instalments, and pledged it with a pawnbroker as security for an advance:—

Held, that upon the true construction of the agreement the hirer was under no legal obligation to buy, but had an option either to return the piano or to become its owner by payment in full; that by putting it out of his power to return the piano he had not become bound to buy; that he had therefore not "agreed to buy goods" within the meaning of the Factors Act 1889 s. 9, and that the owner was entitled to recover the piano from the pawnbroker.

Lee v. *Butler* ([1893] 2 Q. B. 318) distinguished.

The decision of the Court of Appeal ([1894] 2 Q. B. 262) reversed and the decision of Lord Coleridge C.J. and Day J. restored.

THE appellant was the owner of a piano, of which he had given possession to one Brewster, under an agreement in writing of the 23rd of December, 1892. On the 22nd of April 1893 Brewster, improperly and without the consent of the appellant, pledged the piano with the respondents, who are pawnbrokers, as security for an advance. The appellant, upon discovering this, demanded the piano from the respondents, and on their refusing to deliver it, brought an action of trover. The defence set up by the respondents was that they had received the piano from Brewster

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in good faith, and without notice of any claim on the part of the appellant, and that Brewster having "bought or agreed to buy" it from him they were protected by sect. 9 of the Factors Act 1889.

The county court judge held that the defence was not proved, and his judgment was upheld by the Divisional Court (Lord Coleridge C.J. and Day J.). The Court of Appeal (Lord Esher M.R., A. L. Smith, and Davey L.JJ.) came to the conclusion that the defence had been established, and reversed the judgment of the Divisional Court upon the ground that Brewster had agreed to buy the piano within the meaning of the Factors Act (1). The only question was whether the respondents had made out that Brewster had bought or agreed to buy the piano. This depended upon the true effect of the agreement under which he obtained it.

The agreement was in the following terms:—

"This agreement made the 23rd day of December 1892 between Charles Helby of 22 Baker Street (hereinafter called the 'owner'), of the one part, and Charles Brewster of 24 Chester Street Kennington Road S.E. (hereinafter called the 'hirer'), of the other part witnesseth that the owner agrees at the request of the hirer to let on hire to the hirer a pianoforte No. 896 Maker Rass. And in consideration thereof the hirer agrees as follows:—1. To pay the owner, on the 23rd day of December 1892 a rent or hire instalment of ten shillings sixpence (10*s.* 6*d.*); and 10*s.* 6*d.* on 23 of each succeeding month. 2. To keep and preserve the said instrument from injury (damage by fire included). 3. To keep the said instrument in the hirer's own custody at the above-named address, and not to remove the same (or permit or suffer the same to be removed) without the owner's previous consent in writing. 4. That if the hirer do not duly perform this agreement, the owner may (without prejudice to his rights under this agreement) terminate the hiring and retake possession of the said instrument. And for that purpose leave and licence is hereby given to the owner (or agent and servant, or any other person employed by owner) to enter any premises occupied by the hirer, or of which the hirer is tenant, to retake

(1) [1894] 2 Q. B. 262.

tration of bankruptcy law in Ireland, or elsewhere, that should induce us to specially favour the arguments addressed to us on the part of the appellants here.

On the construction of this document I can see no room for any reasonable doubt. The parties expressed what they desired to be their contract in language of reasonable clearness; and in my opinion their intentions are expressed in a way that leaves no room for doubt. I have read with attention the judgments in the Court of Appeal, as I have read the judgment of Judge Boyd with care and attention, and I think the words that appear at the end of the judgment of the Lord Chancellor of Ireland express the outcome of the entire contention, which I myself am willing entirely to adopt: "I cannot come to the conclusion that the property passed where, upon the whole agreement—and I am bound to construe it as a whole—that result would be contrary to the expressed intention of the parties."

My Lords, I entirely agree with the judgment suggested by my noble and learned friend upon the Woolsack, and I myself am clearly of opinion that the grounds of appeal have failed and that the appeal should be dismissed with costs.

LORD SHAND:—

My Lords, I entertain the same opinion as your Lordships in reference to this appeal.

In the Court below there seems to have been a full argument upon another ground which has not been argued here—I mean the ground of the reputed ownership of this engine. That has been entirely abandoned in the argument before your Lordships.

In the argument at your Lordships' Bar the point that has been argued is that it was a violation of the Bills of Sale Act, which is in precisely the same terms in Ireland as in this country. The point, as I understand it, that was made was this: that the bankrupt, having become the owner of the gas-engine in dispute, while retaining possession of it attempted to create a charge on it in favour of the vendors, and the agreement was thus in substance a bill of sale by the bankrupt, which was invalid because it was never registered.

Having heard all the criticisms that have been offered upon

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the terms of that agreement, I am entirely of opinion, with your Lordships, that in substance it cannot be regarded as a bill of sale. It is conceded that in order to succeed in the argument the appellants must shew that the bankrupt became the owner, and therefore was in a position to grant a bill of sale; but the whole terms of the agreement seem to me to exclude the notion that he was to be the owner. The engine was to be held by him with plates affixed to it, stating that Messrs. Crossley Brothers were the owners; the price was to be paid by instalments, extending over a period, I think, of two years; and this very reasonable and natural stipulation was part of the agreement, that until that price should be paid the ownership should not change, and that Messrs. Crossley Brothers should continue to be the owners. If they were the owners, there is an end to this argument.

I can only further say that I entirely concur in the view that in none of the other stipulations of this agreement which have formed the subject of comment is there anything to contradict or render inoperative that clause which expressly says that the property in this engine is to remain with the vendors until the price is fully paid.

I am therefore of opinion with your Lordships, that the appeal fails.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals 13th May 1895.

Solicitors for appellants: *Hasties, for J. Rose Byrne, Dublin.*

Solicitors for respondents: *Grundy, Kershaw, Saxon, Samson & Co., for Grundy, Kershaw, Saxon & Samson, Manchester.*

possession of the said instrument, without being liable to any suit, action, indictment, or other proceeding by the hirer, or any one claiming under said hirer. 5. That if the hiring should be terminated by the hirer (under clause A below), and the said instrument be returned to the owner, the hirer shall remain liable to the owner for arrears of hire up to the date of such return, and shall not on any ground whatever be entitled to any allowance, credit, return, or set-off for payments previously made. The owner agrees:—

"A. That the hirer may terminate the hiring by delivering up to the owner the said instrument.

"B. If the hirer shall punctually pay the full sum of £18 18*s.* by 10*s.* 6*d.* at date of signing, and by 36 monthly instalments of 10*s* 6*d.* in advance as aforesaid, the said instrument shall become the sole and absolute property of the hirer.

"C. Unless and until the full sum of £18 18*s.* be paid, the said instrument shall be and continue to be the sole property of the owner."

By the Factors Act 1889 s. 9: "Where a person, having bought or agreed to buy goods, obtains with the consent of the seller possession of the goods or the documents of title to the goods, the delivery or transfer, by that person or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner."

April 30. *Finlay* Q.C. and *Joseph Walton* Q.C. (*W. B. Hextall* with them) for the appellant:—

The only question is, whether Brewster had "bought or agreed to buy" the piano within the Factors Act. There was no agreement to buy, though there was, on the payment of all the instalments, an agreement to sell. In other words, Brewster

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bargained for an option and nothing more. The hirer was not bound to become a purchaser. The distinction between an option or a "conditional offer" and an agreement to sell or buy is clearly explained by Lord Westbury in *Weston* v. *Collins* (1). There is here no obligation to buy, and only a conditional obligation to sell, and the option ceases if on the 23rd of any month the hirer fails to pay the half-guinea. In *Lee* v. *Butler* (2) there was an absolute agreement to buy and to pay the instalments until the whole sum was made up. In this case the hirer may drop the payments at any time and return the chattel; and that liberty is the great inducement to persons who enter into contracts like this.

This is not an agreement subject to defeasance, or even a conditional agreement. There may be an agreement to buy which does not pass the property and yet may be within the Factors Act. Such a case was *Lee* v. *Butler* (2). But this case is wholly different, and there was no obligation on the hirer to go on paying these instalments, though there was an obligation on the owner to vest the property in the hirer when all the instalments should have been paid.

Jelf Q.C. and *H. D. Greene* Q.C. (*C. L. Attenborough* with them) for the respondents:—

The contract is one of sale, with power for the hirer under specified conditions to change it into one of hire only. There was an obligation to pay on the 23rd of each month. The whole language of the agreement is far more consonant with purchase than with hire, and the instrument is an agreement to buy. The word "instalment" can only be used of a portion of a larger sum, and points conclusively to purchase. Then the power to "terminate the hiring" points the same way. If the terminating act is not done, the thing goes on and is on the high road to purchase. Moreover, if there was originally an option to return, it is now gone, as Brewster put it out of his own power to exercise it. The agreement which was ripening into purchase could only be terminated by the return of the instrument. The case is virtually covered by *Lee* v. *Butler* (2). The case comes

(1) 34 L. J. (Ch.) 353. (2) [1893] 2 Q. B. 318.

within the mischief of the Factors Act 1889, and that enactment should be construed broadly. [They also referred to *Ex parte Wingfield* (1).]

Finlay Q.C. in reply.

The House took time for consideration.

May 30. LORD HERSCHELL L.C. (after stating the facts given above):—

My Lords, it is said that the substance of the transaction evidenced by the agreement must be looked at, and not its mere words. I quite agree. But the substance must, of course, be ascertained by a consideration of the rights and obligations of the parties, to be derived from a consideration of the whole of the agreement. If Brewster agreed to buy the piano, the parties cannot, by calling it a hiring, or by any mere juggling with words, escape from the consequences of the contract into which they entered. What, then, was the real nature of the transaction? The answer to this question is not, I think, involved in any difficulty. Brewster was to obtain possession of the piano, and to be entitled to its use so long as he paid the plaintiff the stipulated sum of 10*s.* 6*d.* a month, and he was bound to make these monthly payments so long as he retained possession of the piano. If he continued to make them at the appointed times for the period of three years, the piano was to become his property, but he might at any time return it, and, upon doing so, would no longer be liable to make any further payment beyond the monthly sum then due.

My Lords, I cannot, with all respect, concur in the view of the Court of Appeal, that upon the true construction of the agreement Brewster had "agreed to buy" the piano. An agreement to buy imports a legal obligation to buy. If there was no such legal obligation, there cannot, in my opinion, properly be said to have been an agreement to buy. Where is any such legal obligation to be found? Brewster might buy or not just as he pleased. He did not agree to make thirty-six or any

(1) 10 Ch. D. at p. 593.

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number of monthly payments. All that he undertook was to make the monthly payment of 10*s.* 6*d.* so long as he kept the piano. He had an option no doubt to buy it by continuing the stipulated payments for a sufficient length of time. If he had exercised that option he would have become the purchaser. I cannot see under these circumstances how he can be said either to have bought or agreed to buy the piano. The terms of the contract did not upon its execution bind him to buy, but left him free to do so or not as he pleased, and nothing happened after the contract was made to impose that obligation.

The Master of the Rolls said: "It is a contract by the seller to sell, and a contract by the purchaser, if he does not change his mind, to buy; and if this agreement goes on to its end, it ends in a purchase. Therefore, it seems to me that the true and proper construction of this instrument, after all, is this: it is an agreement by the one to sell, and an agreement by the other to buy, but with an option on the part of the buyer if he changes his mind to put an end to the contract." I cannot think that an agreement to buy, "if he does not change his mind," is any agreement to buy at all in the eye of the law. If it rests with me to do or not to do a certain thing at a future time, according to the then state of my mind, I cannot be said to have contracted to do it. It appears to me that the contract in question was in reality a contract of hiring, and not in name or pretence only. But for the provision that if the hirer punctually paid the 10*s.* 6*d.* a month for thirty-six months, the piano should be his property, it could not be doubted that it was a mere agreement for its hire, and I cannot see how the fact that this provision was added made it any the less a contract of hiring until that condition had been fulfilled.

I think it very likely that both parties thought it would probably end in a purchase, but this is far from shewing that it was an agreement to buy. The monthly payments were no doubt somewhat higher than they would have been if the agreement had contained no such provision. One can well conceive cases, however, in which a person who had not made up his mind to continue the payments for three years would nevertheless enter into such an agreement. It might be worth

his while to make somewhat larger monthly payments for the use of the piano in order that he might enjoy that option if he chose to exercise it. In such a case how could it be said that he had agreed to buy when he had not only come under no obligation to buy, but had not even made up his mind to do so? The agreement is, in its terms, just as applicable to such a case as to one where the hirer had resolved to continue the payments for the three years, and it must be construed upon a consideration of the obligations which its terms create, and not upon a mere speculation as to what was contemplated, or what would probably be done under it.

It was said in the Court of Appeal that there was an agreement by the appellant to sell, and that an agreement to sell connotes an agreement to buy. This is undoubtedly true if the words "agreement to sell" be used in their strict legal sense; but when a person has, for valuable consideration, bound himself to sell to another on certain terms, if the other chooses to avail himself of the binding offer, he may, in popular language, be said to have agreed to sell, though an agreement to sell in this sense, which is in truth merely an offer which cannot be withdrawn, certainly does not connote an agreement to buy, and it is only in this sense that there can be said to have been an agreement to sell in the present case.

It was argued for the respondents that the case came within the mischief intended to be provided against by sect. 9 of the Factors Act 1889, and that the enactment ought, therefore, to be so construed as to cover it. I can see no reason for thus straining the language of the enactment. A person who is in possession of a piano under such an agreement as that which existed in the present case is no more its apparent owner than if he had merely hired it, and in the latter case any one taking it as security would have no claim to hold it as against the owner.

Reliance was placed on the decision in *Lee* v. *Butler* (1), and it was said that the present case was not, in principle, distinguishable from it. There seems to me to be the broadest distinction between the two cases. There was there an agreement

(1) [1893] 2 Q. B. 318.

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to buy. The purchase-money was to be paid in two instalments, but as soon as the agreement was entered into there was an absolute obligation to pay both of them, which might have been enforced by action. The person who obtained the goods could not insist upon returning them and so absolve himself from any obligation to make further payment. Unless there were a breach of contract by the party who engaged to make the payments the transaction necessarily resulted in a sale. That there was in that case an agreement to buy appears to me, as it did to the Court of Appeal, to be beyond question.

It was further urged for the respondents that when Brewster pledged the piano with them it became impossible for him to return it to the appellant, and he became, therefore, from that time bound to make the stipulated payments and to become the purchaser. I cannot accede to this argument. In my opinion, it is impossible to hold that Brewster, having only a right under the contract to buy, provided he complied with the prescribed conditions, could convert himself into a purchaser as against the owner by violating the conditions of the contract.

I think the judgment appealed from must be reversed. The respondents must pay the costs of this appeal, and in the Court below.

LORD WATSON (after stating the facts):—

My Lords, the terms of the agreement are exceedingly simple, and had it not been for the conflict of judicial opinion which they have provoked, it would not have occurred to me that their true character and substance admitted of much doubt. The only stipulations which are of materiality to the present question are these: Brewster undertook to pay a monthly rent or hire instalment of 10*s.* 6*d.*, commencing on the 23rd of December 1892, subject to the condition that he might terminate the hiring at any time by delivering up the piano to the appellant. In the event of the hiring being so terminated, he was to remain liable to the owners for arrears of hire up to the date when the piano was returned. Then follows a stipulation to the effect that, "If the hirer shall punctually pay the full sum of £18 18*s.*, by 10*s.* 6*d.* at date of signing, and by thirty-six monthly instalments

of 10*s*. 6*d*. in advance, as aforesaid, the said instrument shall become the sole and absolute property of the hirer."

These stipulations, in my opinion, constitute neither more nor less than a contract of hiring, terminable at the will of the hirer, coupled with this condition in his favour, that, if he shall elect to retain it until he has made thirty-six monthly payments as they fall due, the piano is then to become his property. The only obligation which is laid upon him is to pay the stipulated monthly hire so long as he chooses to keep the piano. In other words, he is at liberty to determine the contract in the usual way, by returning the thing hired to its owner. He is under no obligation to purchase the thing, or to pay a price for it. There is no purchase and no agreement for purchase, until the hirer actually exercises the option given him. The respondents' counsel endeavoured to assimilate this case to *Lee* v. *Butler* (1), but in reality the two cases differ essentially. In *Lee* v. *Butler* (1) the so-called hirer was bound absolutely to make payment of £1 on the 6th of May and of £96 4*s*. on the 1st of August, 1892, these sums being described as "rent for the hire or use of certain furniture," which was the subject-matter of the agreement, it being declared that upon due payment of these rents, amounting to £97 4*s*., the furniture was to be "the sole and absolute property of the hirer." It appears to me to have been rightly held that Mrs. Lloyd, the hirer, had truly agreed to purchase the furniture, and could therefore give a good title to a bonâ fide purchaser. Her legal obligation to pay the price attached as soon as the agreement was executed.

Apart from the arrangement for hire of the piano, the only right given to Brewster by the agreement in question was the option to become a purchaser. It is true that whilst he was under no obligation to buy, the appellant was legally bound to give him that option, and could not retract it, if the other stipulations of the contract were duly observed by the hirer. But the possession of such a right of option was, in no sense, an agreement by Brewster to buy the piano; and the appellant's obligation to give the option was not, in the sense of law, an agreement by him to sell. In order to constitute an agreement

(1) [1893] 2 Q. B. 318.

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for sale and purchase, there must be two parties who are mutually bound by it. From a legal point of view the appellant was in exactly the same position as if he had made an offer to sell on certain terms, and had undertaken to keep it open for a definite period. Until acceptance by the person to whom the offer is made, there can be no contract to buy. So long as the agreement stood unaltered there could, in this case, be no contract to purchase by Brewster until he had complied with the terms of the option given him, and had duly made the thirty-six monthly payments which it prescribes as the condition of his becoming owner of the piano.

The distinction between a pre-contract of that kind and a proper agreement for the sale and purchase of goods, does not appear to me to have been sufficiently regarded by the learned judges of the Appeal Court. Their Lordships seem to have assumed that, because the appellant had bound himself to sell if Brewster chose to buy upon the terms prescribed, he was in reality a seller; and that the existence of a seller necessarily implies the existence of a buyer. In my opinion, that reasoning is inconclusive. Whilst, in popular language, the appellant's obligation might be described as an agreement to sell, it is in law nothing more than a binding offer to sell. There can, in such a case, be no agreement to buy, within the meaning of the Act of 1889, until the purchaser has exercised the option given him in terms of the agreement.

Another argument was urged for the respondents, which I find thus succinctly stated, in their fifth reason: "That upon Brewster pledging the pianoforte with the respondents he put it out of his power to exercise his right to determine the agreement by returning the pianoforte, and thereby the agreement to purchase became absolute and unconditional." The argument is, in my opinion, untenable. In a question with the appellant, Brewster could not become purchaser of the instrument, except upon the condition of his observing the stipulations of the agreement and making regular payment of each monthly instalment until the 23rd of November, 1895, which he was under no obligation to do. By the act of pawning he violated these stipulations: and that dishonest act, which was committed

after he had paid only a few out of the thirty-six instalments, is not calculated to suggest that he entertained any intention of becoming purchaser of the piano. It is quite true that Brewster thereby put it out of his power (at least until he could raise the amount for which it was pawned) to return the piano to the appellant; but he at the same time broke his contract, and forfeited his right to exercise the option of purchase given him by the agreement.

For these reasons I am of opinion that the order of the Court of Appeal ought to be reversed, and the judgment of the Divisional Court restored.

LORD MACNAGHTEN:—

My Lords, in this case I think His Honor Judge Bacon took the right view. It seems to me that the agreement under consideration means what it says and can mean nothing more. [His Lordship stated the terms of the agreement:—]

That is an agreement not forbidden by law, not unintelligible, and not, I think, unreasonable. I rather doubt whether the meaning of the parties can be better elucidated or their relative position more clearly defined by speaking of an "option" or of a "defeasance" or by translating their contract into other and more formal language. At least I am unable to express the obvious intention of the parties in simpler or plainer words than those which they have used. The musical instrument dealer let out a piano by the month, and undertook to sell it to the customer conditionally on his making a certain number of monthly payments. But it was the intention of the parties—an intention expressed on the face of the contract itself—that no one of those monthly payments until the very last in the series was reached, nor all of them put together without the last, should confer upon the customer any proprietary right in the piano or any interest in the nature of a lien or any interest of any sort or kind beyond the right to keep the instrument and use it for a month to come. The customer was under no obligation to fulfil the conditions on which and on which alone the dealer undertook to sell. He was not bound to keep the piano for a single day or a single hour. He was no more bound to purchase it after he had signed the agreement than he was

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before. The contract, as it seems to me, on the part of the dealer was a contract of hiring coupled with a conditional contract or undertaking to sell. On the part of the customer it was a contract of hiring only until the time came for making the last payment. It may be that at the inception of the transaction both parties expected that the agreement would run its full course, and that the piano would change hands in the end. But an expectation, however confident and however well-founded, does not amount to an agreement, and even an agreement between two parties operative only during the pleasure of one is no agreement on his part at law.

The learned counsel for the respondents spoke of dealings of this sort with an air of righteous indignation as if they were traps for the extravagant and the impecunious—mere devices to tempt improvident people into buying things which they do not want and for which at the time they can not pay. I think that is going too far. I do not see why a person fairly solvent and tolerably prudent should not make himself the owner of a piano or a carriage or anything else by means of periodical payments on such terms as those in question in the present case. The advantages are not all on one side. If the object of desire loses its attractions on closer acquaintance—if faults are developed or defects discovered—if a coveted treasure is becoming a burthen and an encumbrance it is something, surely, to know that the transaction may be closed at once without further liability and without the payment of any forfeit. If these agreements are objectionable on public grounds it is for parliament to interfere. It is not for the Court to put a forced or strained construction on a written document or to import a meaning which the parties never dreamed of because it may not wholly approve of transactions of the sort.

Lee v. *Butler* (1), on which the Court of Appeal relied, was a very different case. There a person who got some furniture under an agreement which was called a hire purchase agreement was bound by the terms of the agreement to pay for and purchase the furniture. I do not see how *Lee* v. *Butler* (1) can be an authority for the respondents' contention. Nor can I understand why the customer in the present case should be taken to

(1) [1893] 2 Q. B. 318.

have agreed to purchase the piano which he hired because he fraudulently pledged it, and so put it out of his power to return it without redeeming the pledge.

I agree that the judgment under appeal should be reversed.

LORD MORRIS:—

My Lords, I concur.

LORD SHAND:—

My Lords, I am also of the same opinion. The right of the defendant to refuse delivery of the piano in question under the 9th section of the Factors Act depends on his being able to shew that Brewster in whose possession it was had either bought it or agreed to buy it from Mr. Helby the plaintiff and appellant, and the decision of this question depends entirely on the true construction of the agreement between the plaintiff and Brewster under which the latter got possession of the instrument. It is true that by that agreement Brewster undertook to pay to the appellant not only a first instalment of 10*s.* 6*d.* described as a "rent or hire instalment," but to pay the same amount on the 23rd of each succeeding month and that it was provided that on the payment of thirty-six monthly instalments the piano should become his property. If these stipulations had been unqualified there would have been an absolute obligation or agreement by Brewster to acquire the instrument in property, and by purchase, although the instalments were described as for rent or hire, and the case of *Lee* v. *Butler* (1) would have directly applied. But the whole obligations by Brewster were qualified by the stipulation: "That the hirer may terminate the hiring by delivering up to the owner the said instrument." This provision appears to me to make it clear that there was no purchase and no agreement to purchase. The hirer need not continue the hiring a day longer than he desired; and he need not allow the transaction to become one of purchase unless he desired to do so.

An agreement to purchase would infer an obligation to pay a price, the payment of which could be enforced by action, while here it is plain that no action for any balance of the alleged price could be maintained if Brewster thought fit at any time to

(1) [1893] 2 Q. B. 318.

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return the instrument to its owner. The substance of the transaction was a hiring of the piano for the use of which monthly instalments were to be paid with a provision that the arrangement might ultimately result in a purchase, but that this should be entirely at the option of the hirer, and should depend entirely on his thinking fit to make payment of thirty-six monthly instalments. The contract of hiring only was to cease at his option on the instrument being returned to the owner.

It was maintained that under the general words of undertaking to pay future instalments there was an agreement to purchase within the meaning of the Factors Act, although there was power to resolve the agreement or to bring it to an end by returning the instrument. It seems to me to be very difficult to hold that even if in form the agreement could be correctly thus described this would satisfy the provision of the Factors Act which it has been forcibly maintained requires an absolute obligation to purchase and pay a price, or, at least, an obligation which is not merely dependent on the will or wish of the alleged purchaser.

In this case, however, I think there was an agreement of hiring only with an option to the hirer to become the purchaser; and that although there was an obligation to sell if the hirer should avail himself of the right of option to purchase, there was no obligation or agreement to purchase. I cannot hold that there is such an agreement on the part of one who having the beneficial use of the property of another agrees to pay instalments described as rent or hire instalments, and which he is entitled to treat as payments for hire only, because it is also stipulated that by continuing to make the payments for a certain time he shall acquire the property, he having at the same time the power at any moment and at his own will by returning the property to the owner to put an end to any obligation to pay any further instalments.

Order appealed from reversed, and judgment of the Queen's Bench Division restored with costs here and below; Cause remitted to the Queen's Bench Division.

Lords' Journals 30th May 1895.

Solicitor for appellant: *H. E. Tudor.*
Solicitor for respondents: *John Attenborough.*

[HOUSE OF LORDS.]

MIDLAND RAILWAY COMPANY . . . APPELLANTS; H. L. (E.) 1895 May 30.

AND

THE GUARDIANS OF THE POOR FOR THE EDMONTON UNION . . . . . RESPONDENTS.

Poor Law—Guardians—Limitation of Time for Payment of Debt—"Commencement of Proceedings before competent Authority"—Application for Taxation of Costs—"Debt, Claim or Demand incurred or become due"—Poor Law (Payment of Debts) Act 1859 (22 & 23 *Vict. c.* 49) *ss.* 1, 4.

The Poor Law (Payment of Debts) Act 1859 enacts by sect. 1 that "any debt, claim or demand lawfully incurred or become due" from the guardians of any union shall be paid within the half-year in which the same shall have been incurred or become due, or within three months after the expiration of such half-year, but not afterwards.

Sect. 4 provides that if any person claiming any debt or demand shall "commence proceedings in any Court of Law or Equity, or before any justice or other competent authority" within the time thereinbefore limited, and shall with due diligence prosecute such proceedings to judgment or other final settlement of the question, such judgment shall be satisfied by the guardians, notwithstanding that such judgment may be recovered or such final settlement arrived at after the expiration of the period thereinbefore provided.

An appeal to quarter sessions against an assessment to the poor-rate having been allowed with costs, the appellants, within the three months limited by sect. 1, applied to the clerk of the peace to tax the costs. The costs were taxed after the expiration of the three months, and no proceedings to enforce payment of the taxed amount were commenced by the appellants within the three months after the expiration of the half-year in which the costs were taxed:—

Held, that the application to tax was not a commencement of proceedings within the meaning of sect. 4, and that the appellants could not recover the costs.

Quære, whether before taxation of the costs there was "any debt, claim or demand incurred or become due."

The decision of the Court of Appeal ([1895] 1 Q. B. 357) affirmed.

THE facts upon which this appeal was based are fully stated in the judgment of Lord Herschell L.C.

April 30; May 2. *Balfour Browne* Q.C. and *Ernest Page* for the appellants:—

First, this case does not come within the Poor Law (Payment

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of Debts) Act 1859. The liability to pay the costs is a statutory duty imposed on the assessment committee by the Union Assessment Committee Amendment Act 1864, and is not a "debt, claim or demand" within sect. 1 of the Act of 1859. If however it is within that section, then sect. 4 applies to protect the appellants. For if there was a debt due on the 13th of July 1892 the application to tax in December was made within the time limited and was a commencement of proceedings within the meaning of sect. 4. If again there was no debt due till the actual taxation on the 26th of January 1893 the order removing the order of sessions into the Queen's Bench Division was such a commencement of proceedings. In either case the proceedings were such as could be "prosecuted to judgment or other final settlement of the question" within the meaning of sect. 4.

The view taken by Charles J. was the right one, assuming the Act of 1859 to apply. And what proceeding could be more appropriate to bring about a "final settlement of the question" than an application to the only competent authority—the Court of Quarter Sessions—to have the costs taxed? That was the "commencement of proceedings," and those proceedings were continued by the order of removal into the Queen's Bench Division, and by the present action in which final judgment may be given for the appellants. In *West Ham Union* v. *Bath Union* (1) the debt was held to arise at the abandonment of a removal order and not on the demand of costs. *West Ham Union* v. *St. Matthew, Bethnal Green* (2), is distinguishable, because there no steps were taken to enforce the payment of costs, whereas in the present case the appellants applied to the clerk of the peace to tax the costs, and obtained the order of removal, within the statutory periods respectively, whether the time be reckoned from the 13th of July 1892, or the 26th of January 1893. That case is an authority that there is a "debt due" when the order for payment of costs is made, and not when the order is drawn up, or the costs are taxed. It is true that the application to tax was made out of sessions: but it is a common practice to take consent for granted, and consent must be presumed to have been granted. With regard to the order of

(1) 54 J. P. 69. (2) [1895] 1 Q. B. 662.

removal, there was a valid order of a competent Court, and when this order was removed from the quarter sessions into the Queen's Bench Division under Baines's Act (12 & 13 Vict. c. 45) s. 18, it became of the same force as an original order of the Queen's Bench.

Channell Q.C., *Alexander Macmorran* and *R. Cunningham Glen* for the respondents were not heard.

The House took time for consideration.

May 30. LORD HERSCHELL L.C.:—

My Lords, on the 9th of April 1892 the Midland Railway Company appealed to the quarter sessions against an assessment to the poor-rate of certain premises in their occupation. The assessment committee of the Edmonton Union appeared as respondents to the appeal. On the hearing at the quarter sessions on the 13th of July 1892 the appeal was allowed, and it was ordered that the assessment committee should pay the appellants' costs of the appeal. In strictness these costs should have been taxed before the conclusion of the sessions; but the then appellants, believing that an agreement had been entered into to tax the costs out of sessions, sent in the following November their bill of costs to the solicitors to the assessment committee, and obtained an appointment from the clerk of the peace for the taxation of the bill on the 5th of December 1892. The solicitor to the assessment committee objected to the clerk then taxing the bill on the ground that there had been no consent to tax out of sessions. The clerk accordingly declined to proceed with the taxation. At the following quarter sessions, held on the 7th of January 1893, the appellants applied for an order directing the clerk of the peace to tax the bill of costs. The Court of Quarter Sessions directed the clerk of the peace to tax the bill on the ground that the assessment committee had consented to its taxation out of sessions. On the 26th of January 1893 the bill was taxed at the sum of £206 17*s.* 7*d.* The order of quarter sessions was then drawn up, dated the 13th of July 1892.

The terms of this order are important. It was ordered, inter

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alia, that "the respondents do, within fourteen days after the service on them or their clerk of this order, or a copy thereof, pay or cause to be paid to the clerk of the peace of this county, at his offices at Westminster, to be by him paid over to the parties entitled to receive the same, the sum of two hundred and six pounds, seventeen shillings and sevenpence as and for the appellants' costs of and attending this appeal."

The solicitor to the assessment committee wrote that his clients would treat the order as a nullity. Accordingly, on the 29th of June 1893, the appellants applied to a judge for and obtained an order removing the order of sessions into the Queen's Bench Division for the purpose of enforcing it.

On the 7th of August the assessment committee obtained an order nisi to quash the order of sessions. This order nisi was on the 27th of November discharged, with costs. No appeal was presented against this decision, and the time for appealing has now expired.

In consequence of some observations made in the Court of Appeal, I think it right to say that the practice to tax out of sessions has become, I believe, so common that the slightest evidence of consent would induce me to hold that consent had been given. But it is unnecessary to say anything further upon the point, as it must now be taken that the Queen's Bench Division properly refused to quash the order.

On the 5th of January 1894 the clerk to the respondents expressed a doubt whether it was competent for them to pay the costs mentioned in the order of quarter sessions, and asked the appellants not to take proceedings until he had communicated with the Local Government Board. On the 22nd of February he informed the appellants that the respondents declined to pay the £206 17*s.* 7*d.*, and an action was consequently commenced on the 2nd of March following, claiming a mandamus commanding the respondents to pay that sum. The defence set up was that by the provisions of the Poor Law (Payment of Debts) Act 1859 (22 & 23 Vict. c. 49) the respondents were prohibited from making the payment claimed.

Sect. 1 of the statute provides as follows: "With respect to any debt, claim, or demand which may after the passing of this

Act be lawfully incurred by or become due from the guardians of any union . . . such debt, claim, or demand shall be paid within the half-year in which the same shall have been incurred or become due, or within three months after the expiration of such half-year, but not afterwards, the commencement of such half-year to be reckoned from the time when the last half-year's account shall or ought to have been closed. . . ."

It is admitted that the half-years end on the 25th of March and the 29th of September in each year. Any debt or claim which has been incurred or become due between the 25th of March and the 29th of September, must therefore be paid before the 29th of December, and any debt or claim incurred or becoming due between the 29th of September and the 25th of March, before the 25th of June.

Sect. 4 of the Act adds a proviso to the enactment which I have quoted. It is in these terms: "If any person claiming any debt or demand shall have commenced or shall hereafter commence proceedings in any Court of Law or Equity, or before any justice or other competent authority, within the time hereinbefore limited . . . and shall with due diligence prosecute such proceedings to judgment or other final settlement of the question, such judgment shall be satisfied by the guardians against whom the same may be brought, notwithstanding that such judgment may be recovered or such final settlement arrived at after the expiration of the period hereinbefore provided, and all proceedings taken by mandamus or otherwise for enforcing of such judgment without delay shall be deemed to be within the operation of this section."

Charles J., who tried the action, gave judgment for the present appellants. Although he was disposed to think that the debt or claim was incurred on the 13th of July 1892, the date of the order of sessions, and ought, therefore, under sect. 1, to have been paid before the 29th of December, he was of opinion that the application to tax on the 5th of December 1892, the date appointed by the clerk of the peace, was the commencement of a proceeding within the meaning of sect. 4, and that the appellants had, therefore, made out their title to recover the costs.

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The Court of Appeal, by a majority consisting of Lord Halsbury and A. L. Smith L.J., reversed this decision (1). Lindley L.J. dissented, concurring with the view taken by Charles J. Lord Halsbury expressed the opinion that "until a sum of money which was susceptible of payment was ascertained there was no debt, claim or demand become due or incurred by the guardians." He was further of opinion that the effort to tax was not the commencing of proceedings within the meaning of sect. 4.

A. L. Smith L.J. pointed out that whether the order of sessions of July 1892 or the date of taxation of January 1893 was to be taken as the date when the debt or claim of £206 17*s.* 7*d.* was incurred or became due, the action which was brought on the 2nd of March 1894 was too late. He also concurred in thinking that the application to tax was not a commencement of proceedings within sect. 4.

Lindley L.J. thought that the appellants' claim came within sect. 1 of the statute on the 13th of July 1892, when the respondents were ordered to pay the appellants their costs, and that the proceeding to tax was a commencement of proceedings within sect. 4.

I agree with the majority of the Court of Appeal in rejecting the latter contention. I think the proceedings referred to in sect. 4, which are to be commenced within the time limited, must be such as will result in a judgment or in a final settlement equivalent to a judgment. "Such proceedings" must, according to the terms of the section, be prosecuted with due diligence to judgment or other final settlement of the question, and the obligation is to satisfy "such judgment." It must, therefore, be the same proceeding which is prosecuted from its commencement to the judgment or other final settlement. This construction is, in my opinion, strongly supported by the final words of the section.

The application to tax was not the commencement of a proceeding which would issue if duly prosecuted in a judgment or other final settlement, but was merely incidental to the original order of sessions. It was necessary for the purpose of rendering

(1) [1895] 1 Q. B. 357.

the order to pay the costs complete and effectual. Without it that order was not obligatory, and could not have been enforced. The proceedings now pending are not a continuation of the step taken to ascertain the amount of the costs to be paid, but are independent proceedings subsequently initiated.

If, on a true view of the operation of the statute, the debt or demand now sought to be enforced was not incurred or did not become due until after taxation in January 1893, the appellants are equally out of court even supposing they could make good their contention that the present proceedings did not commence with the issue of the writ, but with the order of the Divisional Court by which the order of sessions was brought into the Queen's Bench Division. In any view of the case, therefore, the present appeal must, in my opinion, fail.

Inasmuch, however, as differing views have been expressed with regard to the operation of the 1st section of the statute in the present case, I think it right to express the doubt which I entertain whether any debt, claim, or demand had, within the meaning of that section, been incurred or become due before the taxation of the costs. The order of quarter sessions in terms only created an obligation on the respondents to pay the £206 17*s.* 7*d.* "within fourteen days after the service on them or their clerk" of the order. It is to be observed that the enactment in question is not in the nature of a Statute of Limitation. It is a fetter on the action of the guardians—a prohibition against payment after a certain date. I cannot but doubt whether it was intended to prohibit them from paying after the lapse of three months from the termination of any half-year a debt which they were not at any time during that period liable to pay. It strikes me that the prohibition must refer to something which they might have paid, and did not, and that it can scarcely have been contemplated that they were either to pay a debt before it became payable or to be unable to pay it at all.

My Lords, although I have thought it right to express these doubts, the considerations to which I have already adverted are quite sufficient to dispose of the appeal. I move your Lordships that the judgment of the Court of Appeal be affirmed, and the appeal dismissed with costs.

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LORD WATSON:—

My Lords, this is a suit by the appellant company for recovery of certain costs to which they were found to be entitled by the Court of Quarter Sessions on the 13th of July 1892, in an appeal at their instance against the assessment committee of the Edmonton Union. The duty of paying these costs was imposed upon the respondents in this appeal by sect. 3 of 27 & 28 Vict. c. 39, and the only question arising for your Lordships' decision is, whether they have been relieved of that liability, and the appellants' claim extinguished, by the provisions of sects. 1 and 4 of the Act 22 & 23 Vict. c. 49.

The clerk of the peace at first declined to tax the appellants' costs, on the ground that there had been no consent to taxation out of court; but he eventually did so, in obedience to an order of the quarter sessions, on the 26th of January 1893. As soon as his taxation was completed, he issued to the appellants an order, bearing date the 13th of July 1892, directing the taxed amount to be paid within fourteen days after service of the order, or a copy thereof. That order was duly intimated to the present respondents on the 22nd of February 1893; and they, on the 25th of the same month, gave notice to the appellants that they would treat the order as null and void. It has now been decided elsewhere, and must be assumed, that the taxation was regular, and that the order was binding on the respondents.

In the Courts below, and in the argument of this appeal, the question was discussed whether the order pronounced by the Court of Quarter Sessions on the 13th of July 1892 was in itself sufficient to create a debt, claim, or demand due by the respondents, within the meaning of sect. 1 of the Act of 1859. If so, it was payable by the respondents within the half-year ending on the 29th of September 1892, or within three months thereafter. On the other hand, if no debt, claim, or demand was in the sense of the statute constituted until costs were taxed, and an order issued for payment of the taxed amount, the appellants' claim became payable by the respondents within the half-year which expired on the 25th of March 1893, or the three months immediately following that date.

Whether the one or the other of these views were adopted,

the result of this appeal would, in my opinion, be the same. But I am not prepared to affirm that the appellants were between the 13th of July 1892 and the 26th of January 1893 in right of a debt, claim, or demand, due and payable by the respondents within the meaning of the Act. I think the order made by the Court of Quarter Sessions on the former of these dates was in substance and of necessity nothing more than a finding that the appellants were to have an order for payment of their costs as and when the same should be taxed. Until the amount was ascertained by taxation, there was no debt of which the appellants could legally demand payment, or which the respondents were either bound or in a position to discharge.

The object of the two clauses in the Act of 1859 already referred to is very plain. It is to protect persons subsequently becoming ratepayers in the union from the burden of debts which had been incurred, and ought in due course to have been paid by their predecessors. The effect of the clauses, when read together, is in the first place to impose upon the guardians a statutory obligation to pay, in each half-year, or within three months after its expiry, the whole debts, claims, and demands, which have become due or have been incurred by them during that half-year; and in the second place, in the event of the guardians' failure or refusal to make payment, to extinguish the right of the creditor in such debts, claims, and demands unless he shall within the period thus limited have commenced proceedings in a competent court, and shall with due diligence prosecute the same to judgment or any final settlement. Power is given to the Poor Law Board to extend the time within which payment is to be made for a period not exceeding twelve months from the date of the debt, claim, or demand.

In this case no extension of time has been allowed by the Poor Law Board. In order to save their claim of costs from extinction, it was therefore incumbent upon the appellants to institute proceedings on or before the 25th of June 1893. It is admitted that the appellants did not commence proceedings for that purpose before the 29th of June 1893, when they applied for and obtained from Wills J. an order under sect. 18 of 12 & 13 Vict. c. 45, removing the order of the Court of Quarter Sessions

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into the Queen's Bench Division of the High Court of Justice. It does not appear to me to admit of doubt that before the application was made their claim against the respondents had been cut off by the provisions of the Act of 1859.

I may add that, on the assumption that the appellants' claim for costs became due and payable by the respondents during the half-yearly period which terminated on the 29th of September 1892, or within three months thereafter, their present suit appears to me to be equally untenable. The only proceedings which they took during that period were towards the taxation of their costs; and these, in my opinion, were not such proceedings as the Act contemplates. They were not proceedings capable, as the Act requires, of being prosecuted to final judgment.

For these reasons, I concur in the judgment which has been moved by the Lord Chancellor.

LORD MACNAGHTEN:—

My Lords, I have had an opportunity of reading in print the judgments which have just been delivered, and I entirely concur in them.

LORD SHAND:—

My Lords, I also concur.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals 30th May 1895.

Solicitors for appellants: *Beale & Co.*

Solicitors for respondents: *Howard & Shelton, for Francis Shelton, Lower Tottenham.*

[HOUSE OF LORDS.]

ELIZABETH THORNE . . . . . APPELLANT;

AND

HEARD & MARSH . . . . . RESPONDENTS.

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1895
June 20

Mortgage—Sale — Agent — Fraud — Constructive Notice — Trustee—Cause of Action, Commencement of—Trust Property or Proceeds "still retained" —Statute of Limitations (21 *Jac.* 1, *c.* 16)—*Trustee Act* 1888 (51 *& 52 Vict. c.* 59) *s.* 8.

If fraud or a non-discovery of fraud is to be relied on to take a case out of the Statute of Limitations, it must be the fraud of, or in some way imputable to, the person who invokes the aid of the statute.

In 1878 the respondents, as first mortgagees, sold the property under their power of sale, employing S., who was also the mortgagor's solicitor, to conduct the sale. S. received the sale moneys, and after satisfying the respondents' mortgage, kept the balance for himself instead of paying off the second mortgagee. S. did not inform the second mortgagee of the sale but—acting as the mortgagor's solicitor—continued to pay him interest on the second mortgage as if it were still subsisting. Until 1892 the respondents either did not know that there was a second mortgage or believed a false representation made to them by S. that he had the authority of the second mortgagee to receive the balance. In 1892 the second mortgagee discovered the fraud and brought an action against the respondents for an account and payment of the amount due to him:—

Held, that the action was barred by the Statute of Limitations and sect. 8 of the Trustee Act 1888; that the case did not fall within either of the exceptions mentioned in sect. 8; that the respondents were not "party or privy" to the fraud of S., and that the trust moneys were not "still retained" by them, the moneys not being in their hands or under their control when the action was brought; that in committing and concealing the fraud S. was not acting as the respondents' agent, and that there was nothing to prevent the Statute of Limitations from beginning to run in 1878.

Quære, whether the knowledge acquired by S. as the mortgagor's solicitor was constructive notice to the respondents of the existence of the second mortgage, so as to make them trustees for the second mortgagee.

The decisions of Romer J. ([1893] 3 Ch. 530) and the Court of Appeal ([1894] 1 Ch. 599) affirmed.

LEASEHOLD premises were mortgaged for £1000 to one who afterwards assigned the mortgage to the respondents. Henry Thorne became a second mortgagee for two sums of £200 and £133. In these transactions Searle acted as solicitor for the

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mortgagor, for the respondents and for H. Thorne, respectively. Searle was also a subsequent mortgagee for £375 3*s.* 6*d.*

In 1878 the respondents under a power of sale in their mortgage sold the property for £1700. Searle, who acted as the respondents' solicitor, received the purchase-money, and out of it paid off the respondents' mortgage and kept the balance for himself. He gave the respondent Heard, or placed among his papers, two stamped receipts signed by himself. The first ran thus:—

"Crediton, 5th February 1878.

"Received of Messrs. Henry Ellis Heard and William Marsh the sum of Three hundred and thirty-three pounds, being principal moneys due to Mr. Henry Thorne on two further charges by way of mortgage on 'The Nest,' Torquay, Devon, dated respectively the 25th day of June 1869 and the 22nd November 1870, and I undertake to deliver to them the indentures, dated the 15th and 18th March 1872, being transfers of such mortgages, and Mr. Thorne's receipt endorsed thereon within fourteen days from this date."

The second ran thus:—

"Crediton, 5th February 1878.

"Received of Messrs. Henry Ellis Heard and William Marsh the sum of Three hundred and seventy-five pounds three shillings and sixpence, being the balance of the purchase-money of 'The Nest,' Torquay, Devon, sold to Mrs. Eliza Stewart for One thousand seven hundred pounds (after their retaining the sum of One thousand pounds due on their first mortgage, and paying to Mr. Henry Thorne, of Dart, Witheridge, the sum of Three hundred and thirty-three pounds due to him on mortgage of the same premises, subject to the first security to them), the sale thereof having been carried out by Messrs. Henry Ellis Heard and William Marsh, with the approval of Mr. Henry Thorne and at my request."

There was evidence that the respondents were not aware of the existence of Thorne's mortgage until Searle's bankruptcy in 1892.

Before completion of the sale Searle wrote on the 3rd of

January 1878 to H. Thorne: "This property is now under contract for sale. The abstract of title has been prepared and sent to Messrs. Kitson, of Torquay, who now require to see the deeds. I should be glad if you would by return of post send me all the deeds relating to this property in your possession." Thorne accordingly sent Searle his deeds, two of which Searle gave or sent to the respondents. In December 1878 Searle got back from the respondents those two deeds and returned to Thorne all his deeds. Searle never told Thorne that the sale had been carried out, and continued to pay him interest on his mortgages until 1892, when Searle became bankrupt and his fraud was discovered. H. Thorne then brought this action against the respondents for an account of the sale and payment of what was due to him. The plaintiff having died, the proceedings were continued by his executrix, the appellant.

Romer J. dismissed the action, holding that the plaintiff's claim was barred by the Trustee Act 1888 s. 8 (1), and this decision was affirmed by the Court of Appeal (Lindley, Kay and A. L. Smith L.JJ. (2)).

The material parts of sect. 8 of the Trustee Act 1888 (51 & 52 Vict. c. 59) are as follows: "In any action or other proceeding against a trustee or any person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his use, the following provisions shall apply: (*a*) All rights and privileges conferred by any Statute of Limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action or other proceeding if the trustee or person claiming through him had not been a trustee or person claiming through him: (*b*) If the action or other proceeding is brought to recover money or other property, and is one to which no existing Statute of Limitations applies, the trustee or person claiming through him shall be entitled to the benefit of and be at liberty to plead the lapse of time as a bar to such action or other proceeding in the like manner and

(1) [1893] 3 Ch. 530. (2) [1894] 1 Ch. 599.

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to the like extent as if the claim had been against him in an action of debt for money had and received. . . ."

Cozens-Hardy Q.C. and *W. F. Phillpotts* for the appellant:—

The respondents sold the property and received the proceeds and became trustees of the balance (after paying their own mortgage) for the persons entitled, including the appellant's testator. It was their duty to discover what subsequent incumbrancers there were, and they would have been liable even if they had not had direct notice of Thorne's mortgage through his title-deeds and the receipts given them by Searle. Apart from direct notice they had constructive notice through their solicitor Searle who obtained Thorne's deeds from him. The Courts below treated the liability of the respondents as clear, unless the Trustee Act gives protection. And it does not, for the case falls within each of the exceptions mentioned in s. 8. The respondents were "party or privy" to "a fraud or fraudulent breach of trust" in concealing from Thorne the fact of the sale, and in not paying off his mortgage. Searle was their agent; he was not Thorne's agent to receive the money, and they were party to Searle's fraud (which was committed in the course of his business as the respondents' agent), because they had notice of Thorne's claim and they had the deeds which disclosed his interest. It was their duty to instruct Searle, their agent, to pay the balance of the purchase-money to the person entitled. They had at least such constructive notice as is mentioned in the Conveyancing Act, 1882, s. 3; and it was their duty to find out what incumbrances there were, and to see that they were paid off with the purchase-money: *Charles* v. *Jones*. (1) The second exception also applies. The proceeds of the trust property were "still retained"; retention by the agent is retention by the principal. The extent to which a principal is held liable for the fraud or fraudulent misrepresentation of his agent is shewn in *Barwick* v. *English Joint Stock Bank* (2); *Mackay* v. *Commercial Bank of New Brunswick* (3); *Swire* v. *Francis* (4); and *M'Gowan* v.

(1) 35 Ch. D. 544.
(2) L. R. 2 Ex. 259, 265.
(3) L. R. 5 P. C. 394.
(4) 3 App. Cas. 106.

Dyer (1). *British Mutual Banking Company* v. *Charnwood Forest Railway Company* (2) has no application. In *Moore* v. *Knight* (3) it was held that the principle of *Blair* v. *Bromley* (4) was unaffected by the Trustee Act. Moreover, even if the respondents could otherwise claim the benefit of the Act of 1888, the statute only began to run in their favour from the discovery of the fraud in 1892—less than six years before action: *Blair* v. *Bromley* (4); *Vane* v. *Vane* (5). It was not Thorne's fault that the fraud was not discovered earlier: he never had an opportunity of discovery, as Searle continued to pay him interest on his mortgage. It was entirely due to the negligence and breach of duty of the respondents that Searle was enabled to commit the fraud and conceal it. The respondents are thus estopped from denying their liability for the fraudulent concealment of the fraud. The breaches of trust in retaining the moneys and in not disclosing the sale and receipt were continuous and repeated day by day until Searle's bankruptcy: hence the Trustee Act has no application.

Warmington Q.C. and *J. A. Creed* for the respondents were not heard.

LORD HERSCHELL L.C. (after stating the mortgages):—

My Lords, in the latter part of 1877 there was a contract made to sell the property in question. Whether the transaction was initiated by the respondents or by the mortgagor for whom Mr. Searle was acting, or whether it had its origin with Mr. Searle himself, who was the third mortgagee of the same property, does not appear; but it is beyond dispute that he was acting with the full sanction of the first mortgagees and on their behalf, and acting in the exercise of the power of sale vested in them. The purchase-money, £1700, was received by Mr. Searle. No part of it ever came physically into the hands of the respondents except £1000, which was paid to them by Mr. Searle in discharge of their mortgage; the rest remained in the hands of Mr. Searle.

(1) L. R. 8 Q. B. 141.
(2) 18 Q. B. D. 714.
(3) [1891] 1 Ch. 547.
(4) 2 Ph. 354; 5 Hare, 542.
(5) L. R. 8 Ch. 383.

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No doubt Mr. Searle, who was aware of the mortgage to Thorne, ought at once to have paid over to Thorne out of the £700 the amount due to him, namely, £333, and only to have retained for his own purposes the residue. But instead of that he retained the entire sum in his hands and applied it to his own purposes, paying from time to time the interest due upon Thorne's mortgage to Thorne; and I take it that Thorne was not aware that his mortgage was not still subsisting. In 1892 Searle became bankrupt, and then the fraud of which he had been guilty came to light. Of course, about his fraudulent conduct there is no question.

My Lords, the appellant puts his case in this way: The first mortgagees, the respondents (he says) received this £1700 through their agent Searle. Upon receiving it they became trustees of all that was not necessary to satisfy their mortgage debt for the persons entitled, namely, the second mortgagee and the third mortgagee. It is said that in not paying the money to the second mortgagee they were guilty of a breach of trust, that they can be called to account by the second mortgagee in respect of it, and that the claim which the second mortgagee makes is not barred by the Statute of Limitations, because although the Act relieving trustees passed in the year 1888 has in certain cases enabled trustees to plead the Statute of Limitations where they could not have done so before, yet by reason of the exceptions in that statute the present case is not one in which the trustees can avail themselves of that defence; and moreover that the time only began to run from the year 1892, when they discovered the fraud; so that even if the case be within the statute the statutory period has not yet elapsed.

My Lords, so far as appears upon the evidence, the respondents were never aware, down to the time of the sale and the receipt of this money by Searle, that any second mortgagee existed at all. As far as appears, all that they knew was that there was a mortgagor, that Searle himself had an interest as mortgagee, and that Searle was the solicitor for the mortgagor.

But it is said that although they may not themselves have known of the existence of Thorne and of the second mortgage to him, yet the fact that there was such a mortgage was known to

Searle. That fact was undoubtedly known to Searle; but it is equally clear that he had acquired that knowledge not in connection with this transaction at all; he had acquired that knowledge previously, when he was not in any way acting for the respondents, because he had been the person who negotiated that mortgage with Thorne. It is true that in the course of this transaction of sale Searle for some reason or other had put upon the abstract of title a reference to this mortgage, and on the requisition of the purchaser he obtained from Mr. Thorne, telling him that it was for the purpose of a contract of sale, his deeds with a view to letting the proposed purchaser, or the person under contract to purchase, see them. He subsequently received them back, and re-delivered them to Thorne. It is said that in this way he did become acquainted with the fact of this second mortgage whilst acting as solicitor in this transaction for the respondents.

My Lords, considering that the solicitor knew aliunde of the existence of this mortgage, that it was not necessary in any way to communicate its existence to the first mortgagees in regard to their sale under the powers given by that mortgage, and seeing that all he did was to make use of the knowledge he had previously acquired to ask for the deeds in the way I have described, I think it may be a matter open to question whether that would be knowledge by their solicitor which could be imputed to the respondents so that it must be regarded as their knowledge. My Lords, it is quite unnecessary to express an opinion upon or to determine that point. I have only made these observations in order that I may not be supposed to assent without further consideration to the proposition contended for on behalf of the appellant.

Now, my Lords, the question arises whether the Statute of Limitations can be pleaded. First, it is said that the right did not arise until 1892, when the fraud was discovered, that there was here a concealed fraud, and that although there was no fraud on the part of the respondents (that is not alleged) nor any concealment on their part, yet that there was fraud on the part of a person acting as their agent (namely, Searle), a concealment by Searle, who was the agent for the respondents, and that

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consequently it was not until the discovery that any cause of action arose.

My Lords, I am entirely unable to give any countenance to such an argument. It appears to me perfectly clear that in order to charge any person with a fraud which has not been personally committed by him the agent who has committed the fraud must have committed it while acting within the scope of his authority, while doing something and purporting to do something on behalf of the principal. If the person is doing something within the scope of his authority and purporting to do it for his principal, although in doing it he commits a wrong which his principal neither sanctioned nor intended, the principal may be liable. But if the person, although he has been employed as agent, is not, in the transaction which is the wrongful act, acting for or purporting to be acting for the principal, it seems to me impossible to treat that as the fraud of the principal. Now, in this case there is no pretence for saying that in what he did that was fraudulent, or what he improperly concealed, Searle was acting for the respondents. It appears to me that as soon as they had received the £1000, leaving Searle in possession of the remainder in which they claimed no right or title, to which they believed either Searle or somebody for whom he was acting was entitled, all agency on their behalf by Searle in relation to that surplus was absolutely at an end. From that moment he held it not as their agent at all; it was not intended that he should hold it for them; they did not contemplate that he was holding it for them, nor did he intend to hold it for them. To suppose that in defiance of the intentions of both the parties to such a transaction nevertheless there was the relation of agency would, it seems to me, be a somewhat extravagant conclusion. I therefore can entertain no doubt that in the present case there has been no such fraud or concealed fraud shewn as to prevent the statute running, if the statute applies, from the year 1878.

My Lords, I ought to notice one point which was pressed—or rather two points—that it was the duty of the respondents to find out Mr. Thorne and to see that he was paid, and that this was a continuing duty which they have violated. My Lords, if

such a doctrine as that were to be given assent to in a case such as this, the value of the statute of 1888 would be practically at an end. It is said that here the respondents gave back to Searle Thorne's deeds, and so enabled him to commit the fraud. They only had those deeds in their possession by an accident. There was nothing to call their attention to the fact that they were Thorne's deeds. They received them after the sale was completed at a time when they did not believe they had any further interest in the transaction at all. They were asked to look in a bundle of deeds to see if they had two deeds described in a particular way. They found those deeds and returned them. There was no obligation upon them to see what the contents were, and there is no reason to suppose that they ever did know the contents. To say that under those circumstances the Act imposes any liability upon them seems to me a hopeless contention.

My Lords, the only remaining question is, Did the statute apply? It is contended that it did not, because of the exception contained in the 1st sub-section to sect. 8: "Except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy." My Lords, it seems to me to be impossible seriously to say that the respondents were "party or privy" to the fraud in this case. The fraud was a fraud committed by Searle entirely subsequent to the transaction in which they had any interest or any concern, and they neither knew of it, nor assented to it, nor received any benefit from it, nor took part in it in any sort of way. Under these circumstances, I am at a loss to see how it can be said that they were "party or privy" to it.

But then it is said there is another exception, namely, where the claim is "to recover trust property or the proceeds thereof still retained by the trustee"—"still," of course, meaning at the time when the action is brought. In spite of the ingenious argument addressed to us by Mr. Cozens-Hardy upon this point, I remain unconvinced. I have a difficulty in seriously grasping the contention. To say that the leaving this sum of money with Searle by the respondents under the belief that it was money which Searle was entitled to keep and hold and distribute, in

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which they had no sort of concern, with which they had nothing to do, was a retaining of the money by them so that it was in their hands at the time when this action was brought, is a proposition I can scarcely treat seriously.

For these reasons, my Lords, I think that the judgment of the Court below is right and ought to be affirmed.

LORD ASHBOURNE:—

My Lords, I entirely concur. I think that sect. 8 of the Trustee Act of 1888 supplies a clear defence; and that is the opinion of all the learned judges before whom this case has come. Romer J. had no doubt upon that; and the three Lords Justices of Appeal in giving reasoned judgments also came clearly to that conclusion. I really think this section might be nearly torn up if it is not to be held to apply to a case of this kind. It is difficult to imagine what case it would apply to if it does not apply to this.

It has been urged in the lengthened argument which has been addressed to your Lordships that the section would not apply because some case of fraud might be imagined or imputed or suggested against the defendants. It has also been urged that it might be imputed that they still have the fund under their control. I am unable to follow either of these contentions. I am unable to see any ground on which it can be suggested that anything like fraud can be imputed to the trustees, or on which anything can be suggested, bringing them within the exceptions in the clause in regard to their action. That being so, I think the appeal entirely fails.

Therefore I am clearly of opinion that the appeal should be dismissed with costs.

LORD MACNAGHTEN:—

My Lords, I am of the same opinion. By a recent and I think a very beneficial change of the law, a trustee who has committed a breach of trust is entitled to rely on any Statute of Limitations as fully as anybody may do who is not a trustee, provided his conduct has been free from any taint of fraud, and provided he has not derived and is not in a position to derive

any personal benefit from the transaction impeached as a breach of trust. I assume that but for recent legislation the respondents would have been liable to answer the appellant's claim. But I think the Act of 1888 was intended to apply and does apply to such a case as this; and indeed I cannot imagine any case to which the Act could more properly or more clearly apply than the case which has been discussed before your Lordships to-day.

LORD DAVEY:—

My Lords, I am of the same opinion. It appears to have been assumed, or it is stated in one of the judgments which have been read to us to be not in dispute, that but for the Act of 1888 the defendants would have been liable in the present case. I will assume without expressing any opinion of my own that that is so.

But, my Lords, assuming that the constructive notice for which Mr. Phillpotts contended would have brought to the knowledge of Mr. Heard that which certainly he did not in fact know at the date of the sale, that Thorne was an encumbrancer upon this property, so as to convert Mr. Heard and his co-trustee into trustees for Thorne, I am of opinion that the statute of 1888 forms a perfect answer to the claim.

Two questions have been argued: First, whether the case is not within one of the exceptions mentioned in the early part of the 8th section; and secondly, it has also been argued that, independently of the statute, the time began to run only at a period less than six years before the commencement of this action. My Lords, I do not desire to say anything more than has been already said by your Lordships, or more than is contained in the judgments which have been delivered in the Courts below, upon the first point. It appears to me to be impossible to say that the money was "still retained" by the trustees; and, my Lords, it must be remembered that there is no evidence of actual knowledge, or, rather, I should say, that the evidence disproves actual knowledge on the part of the respondents of Mr. Thorne's position. But it is sought to say (I am not speaking of constructive notice) that they must have acquired knowledge of it through the receipt which was signed by Mr. Searle purporting

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to act as Thorne's agent and put with the respondents' papers. Now, my Lords, it appears to me that the appellant is in this dilemma: either the respondents read that receipt, or they did not. If they did not read it, I see no evidence whatever that they acquired any knowledge of Thorne's existence, or of his interest in the property, and the money was in that view paid to the mortgagor's agent. If they did read that receipt, what did it tell them? It told them that Searle was (I will assume wrongly) purporting to act as Thorne's agent, and that he had given a receipt in discharge of the respondents in that character. My Lords, if they did read this receipt, why were they not at liberty to believe, erroneously as it turns out, but still to believe, that Searle was acting in that character? If so, it appears to me the case is exactly the same—in fact, the case is that they paid away upon that view the money to Searle, erroneously believing that he was Thorne's agent. If that be the state of facts, it seems to me idle to contend that money which is paid away by a trustee to another person, in the erroneous belief that he fills a particular character which it turns out he does not fill, is still retained by the trustee within the meaning of the Act.

My Lords, upon the other point, which was so fully discussed before your Lordships, that the statute did not begin to run till within six years of the beginning of this action, I only desire to say this: In my opinion, if fraud, or a non-discovery of fraud, is to be relied on to take a case out of the Statute of Limitations, it must be the fraud of or in some way imputable to the person who invokes the aid of the Statute of Limitations. Now the fraud which is imputed to Searle, and apparently justly, is that he put Thorne off his guard by continuing to pay his interest to him as if his security was still a subsisting one. My Lords, it cannot be pretended for a moment that he was acting as agent for the respondents in doing that. He did not make the payments of interest in his character of agent for the respondents—he made them as agent for the mortgagor; and I see no foundation whatever upon which Searle's fraud can be attributed to the respondents, or can be said to have been committed by him while he was acting in the character of the respondents' agent.

Upon that ground, and the other grounds which have been

stated in the judgments delivered in the Courts below and by your Lordships, I hold that there was no fraud imputable to the defendants which would prevent the running of the Statute of Limitations.

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Judgments of the Court of Appeal and of Romer J. affirmed and appeal dismissed with costs.

Lords' Journals 20th June 1895.

Solicitors for appellant: *Mear & Fowler, for G. H. Thorne, Nottingham.*

Solicitors for respondents: *Yarde & Loader, for Burd, Pearse & Prickman, Okehampton.*

[HOUSE OF LORDS.]

INGLIS . . . . . APPELLANT;

AND

GILLANDERS . . . . . RESPONDENT.

H. L. (Sc.) 1895 *May* 30.

Entail—Trust—Directions to entail Lands on the Heirs of another entailed Estate—Disentail of that Estate.

By trust-disposition and settlement a testator directed his trustees to execute a deed of entail of the lands of Newmore to and in favour of his niece, and a series of heirs specified, "whom failing, to my nephew," J. F. G. "of Highfield; and failing the whole persons above specified, then, from respect to my deceased grandfather," G. G. "of Highfield, to the heir in possession of the estate of Highfield under the entail thereof for the time, and to the other heirs-substitute in said entail in the order set down in the said entail successively, declaring that my object and intention is that, failing the above series of heirs named by me, then the said lands and estate hereby conveyed are to be held by the heir of entail of the estate of Highfield, along with the said estate of Highfield." By a codicil to the trust-deed the testator expressed his desire that it should be understood "that the destination, in the series of heirs of entail set forth in the foregoing settlement, to" J. F. G., "my nephew, who is now in possession of the estate of Highfield under the entail thereof, has been made by me out of respect to the memory of my late grandfather," G. G. "of Highfield, the entailer of the said estate."

The trustees in 1869, J. F. G. being then in possession of Highfield, by deed of entail disponed Newmore to the series of heirs other than the heirs of the entail of Highfield, in the words of the destination contained in the

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trust deed, the entail proceeding: "Whom failing, to" J. F. G. "of Highfield, who is the heir now in possession of the estate of Highfield under the entail thereof executed by" G. G. . . . "and failing the said" J. F. G., "then to the other heirs-substitute in said entail of Highfield."

J. F. G. died and was succeeded by his son, who disentailed Highfield and conveyed it to trustees for a series of heirs different from those called to the succession by the original entail. The pursuer, who was the only heir of entail of Newmore unless the destination to J. F. G. and the heirs called in substitution to him was effectual, thereupon brought an action for a declarator that he was fee-simple proprietor of Newmore, as being the last heir in existence under the destination, and to have the deed of entail of Newmore executed by the trustees set aside as being ultra vires so far as it purported to carry Newmore to the substitute heirs under the Highfield entail independently altogether of their having when the succession opened to them the character of heirs of entail in possession of Highfield:—

Held, that the pursuer was not entitled to a decree, for the destination in the deed of entail, so far as it created an unconditional succession to Newmore in the other heirs-substitute of Highfield, was warranted by the terms of the trust-deed and codicil; and that this destination was still operative, although the entail of Highfield was no longer in existence.

APPEAL against interlocutors pronounced by the Second Division of the Court of Session in an action raised at the instance of George Inglis of Newmore, the appellant, against, amongst others, Charles A. Gillanders, the respondent.

The following statement of the appellant's claim is taken from the opinion of Lord Watson:—

The appellant and pursuer of this action was the heir in possession of the estate of Newmore, in the county of Ross, under the fetters of an entail executed in October, 1869, and thereafter duly recorded by the testamentary trustees of the late Francis Mackenzie Gillanders of Newmore, in pursuance of directions to that effect contained in his trust settlement dated the 5th of August, 1858, and relative codicil dated the 9th of July, 1860. The object of the suit was to establish that the appellant was the last heir of destination subject to the fettering clauses of the entail, and therefore proprietor of the estate in fee simple.

The following is the direction contained in the trust deed of the testator, Francis Mackenzie Gillanders of Newmore:—

"Secondly, whereas it is my intention and desire that my lands and estate of Newmore, and any other lands of which I

may die possessed, shall be settled upon and descend to the series of heirs hereinafter specified . . . . Therefore I do hereby direct and appoint that my said trustees shall execute a disposition and deed of entail of the said lands and estate of Newmore, and of any other lands of which I may die possessed as aforesaid, whereby the said lands shall be disponed, under the conditions and subject to the burden of the annuities hereinafter mentioned, to and in favour of my niece the said Mrs. Katherine Falconer Gillanders or Inglis; whom failing, to her eldest son George, and the heirs-male of his body; whom failing, to her second son John Gillanders, and the heirs-male of his body; whom failing, to her third son William, and the heirs-male of his body; whom failing, to the heirs-male of the body of the said Katherine Gillanders; whom failing, to my nephew James Falconer Gillanders, Esquire of Highfield; and failing the whole persons above specified, then, from respect to my deceased grandfather, George Gillanders, Esquire of Highfield, to the heir in possession of the estate of Highfield under the entail thereof for the time and to the other heirs-substitute in said entail in the order set down in the said entail successively; declaring that my object and intention is that, failing the above series of heirs named by me, then the said lands and estate hereby conveyed are to be held by the heir of entail of the estate of Highfield along with the said estate of Highfield, under the burdens, conditions, provisions, and others contained in the disposition and deed of entail to be executed by my trustees as aftermentioned." Then followed a clause that the deed should contain all other clauses, &c., the trustees considered requisite for effectuating the testator's design.

On the 9th of July, 1860, the testator executed a codicil to the above deed in which the following passage occurs:—

"I desire it to be understood that the destination, in the series of heirs of entail set forth in the foregoing settlement, to James Falconer Gillanders, my nephew, who is now in possession of the estate of Highfield under the entail thereof, has been made by me out of respect to the memory of my late grandfather, George Gillanders of Highfield, the entailer of the said estate, as well as the subsequent destination to the heir of entail

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in possession of the said estate of Highfield under the entail thereof for the time and to the other heirs-substitute in the said entail in the order set down in the said entail successively, my object and intention being the same as expressed in the foregoing trust-disposition and settlement."

In carrying out the directions in the testator's trust-disposition and codicil, the trustees executed, on the 28th and 30th of October, 1869, a deed of entail which contained the following: "to the said Mrs. Katherine Falconer Gillanders or Inglis; whom failing, to her eldest son, George Inglis, and the heirs-male of his body; whom failing, to her second son, John Gillanders Inglis, and the heirs-male of his body; whom failing, to her third son, William Hugh Inglis, and the heirs-male of his body; whom failing, to the heirs-male of the body of the said Katherine Falconer Gillanders or Inglis; whom failing, to James Falconer Gillanders, Esquire of Highfield, who is the heir now in possession of the estate of Highfield under the entail thereof executed by George Gillanders, Esquire of Highfield, dated the 7th day of February, 1798, and deed of partial revocation thereof, dated the 10th day of October, 1800, being the entail referred to in the said trust-disposition and settlement; and failing the said James Falconer Gillanders, then to the other heirs-substitute in said entail of Highfield, in the order set down in said entail successively, videlicet"; and there followed an enumeration of the whole heirs of entail called under the deed of entail of Highfield, beginning with John Gillanders (the institute called under said entail) and the heirs-male of his body.

Mrs. Katherine Falconer Gillanders or Inglis died in 1872. Her eldest son, George Inglis, the appellant, succeeded her in the estate of Newmore. There were no heirs-male of his body. Her second and third sons both died without heirs-male. James Falconer Gillanders died in 1881. His eldest son, George Gillanders, succeeded him as heir of entail in possession of the estate of Highfield. He disentailed Highfield, and died in 1885, leaving a trust deed conveying Highfield to trustees to dispone it to a different series of heirs than those set out in the Highfield entail of 1798. The respondent, Charles Alexander Gillanders, was the person who would have succeeded to the

estate of Highfield on the death of George Gillanders, his brother, had that estate not been disentailed. He was also the next heir entitled to succeed the appellant in the estate of Newmore.

In these circumstances, the appellant brought this action for the reduction of the entail executed by the trustees as being ultra vires; and claimed to be the only heir of entail in existence under the entail directed to be made by Francis Mackenzie Gillanders, and to be, therefore, proprietor in fee simple of Newmore.

1894. July 7. The Lord Ordinary (Kyllachy) found that, owing to the disentail of Highfield, the destination directed by the testator in favour of the heirs of entail of Highfield was no longer operative, and, so far as the trustees' entail of Newmore expressed the contrary, it was disconform to the testator's directions. He therefore granted the conclusion of reduction.

The Second Division (22nd of December, 1894). Lord Rutherfurd Clark, delivering the judgment of the Court, recalled the Lord Ordinary's interlocutor and assoilzied the respondent from the conclusions of the action (1).

On appeal,

1895. May 7. *The Lord Advocate* (*Balfour*, Q.C.) and Sir *Charles Pearson* (of the Scottish Bar), for the appellant:—

The trustees have not framed the destination in the deed of entail so as to comply with the directions of the testator. The destination prescribed by the trust-deed to the "heir in possession of the estate of Highfield under the entail thereof for the time" was not followed by the trustees: although it was a condition precedent to the succession of the heir of Highfield to Newmore that at the time of the succession Highfield should be held under the entail made by the grandfather. The intention of the testator was to keep the two estates together.

(1) 22 Court Sess. Cas. 4th Series (Rettie), 266.

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Asher, Q.C., and *C. S. Dickson* (both of the Scottish Bar) (with them *Clarke Hall*), for the respondent:—

The entail executed by the trustees was framed in accordance with the directions of the testator. No change was made in the destination authorized by him. The trust-disposition and the codicil declare the selection of the heir under the entail of Highfield to be out of respect to the memory of the testator's grandfather, Mr. Gillanders of Highfield. That was the paramount intention. The testator says: "After the exhaustion of the specified heirs, I desire to give Newmore to those persons who my grandfather called to his estate." The testator uses the expression "the heir in possession of Highfield," not for the purpose of making the possession of Highfield a condition precedent to the right of succeeding to Newmore, but to identify the person who is to take Newmore in the event of all the persons named and described in the destination down to and including Mr. Gillanders predeceasing the testator. In that case, the introduction of Mr. Gillanders as substitute, and, after him, the other heirs-substitute in the said entail of Highfield, was correct, and followed the expressed intention in the codicil: see *Gordon* v. *Gordon* (1).

LORD HERSCHELL L.C.:—

I have had an opportunity of considering the opinion which my noble and learned friend Lord Watson is about to express, and it is only necessary for me to state that I entirely concur in the views contained in that opinion.

LORD WATSON (having stated the object of the suit as above set out, continued):—

The appellant did not dispute that under the deed of entail as executed a series of tailzied substitutes are called after him; but he maintains that the unconditional introduction of these heirs-substitute into the destination was not warranted by the terms of the trust. The action concluded for reduction of the destination, in so far as it relates to these heirs.

(1) 13 Court Sess. Cas. 4th Series (Rettie), 934.

The Lord Ordinary (Kyllachy) found that the destination was to that extent disconform to the directions of the trust, and gave the appellant decree of reduction. His judgment was reversed by the learned Judges of the Second Division, who assoilzied the respondent. I concur in that result; but I have not found it necessary to consider all the reasons which were assigned for it by Lord Rutherfurd Clark in delivering the judgment of the Court.

In the argument addressed to us no serious controversy was raised in regard to the duty cast upon the trustees by the directions of the truster. His trust-deed contains a specification of the line of heirs whom he intended to take successively under the entail which he directed to be made. In settling the terms of the destination to be inserted in the deed of entail, the trustees were not bound to adopt the ipsissima verba of the deed of trust. On the other hand, they would not have been justified in framing the tailzied destination so as to disturb any right conferred by the language of the trust-deed, or to create any beneficial interest which would not have arisen had its language been strictly followed. I did not understand the respondent to dispute that if such an interest had been created by the trustees to the prejudice of the appellant, in their endeavour to carry out the directions of the truster, the deed of entail would be, to that extent, reducible, at the appellant's instance.

I have been unable to accept the argument maintained for the respondent, to the effect that the line of destination prescribed by the deed of trust was altered or modified by the codicil of the 9th of July, 1860. In my opinion, the sole effect of the codicil is to reaffirm and emphasize the motives which induced the truster to direct that, failing his kindred of the Inglis family, the succession under the Newmore entail was to devolve upon the successors of his grandfather, George Gillanders, under the entail of Highfield. I therefore prefer to rest my judgment upon the terms of the destination contained in the trust deed, which appear to me to embody the whole intentions of the testator with respect to the line of heirs to be called in the entail. I am of opinion that, had the deed of entail repeated verbatim the language used by the testator to describe the heirs whom he

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preferred, the appellant would have occupied the same position, and the posterior substitutes whom he seeks to displace would have had the same jus crediti as he and they respectively occupy and possess under the deed of entail as executed.

I now proceed to consider the terms of the trust-deed, and shall notice, in the first place, those branches of the destination in regard to which there is no controversy. The institute is the testator's niece, Katherine Falconer Gillanders or Inglis; and to her there are substituted successively, her eldest son George, and the heirs-male of his body; whom failing, her second son John Gillanders, and the heirs-male of his body; whom failing, her third son William, and the heirs-male of his body; whom failing, the heirs-male of the body of the institute; whom failing, James Falconer Gillanders, of Highfield, the nephew of the testator.

Katherine Falconer Gillanders or Inglis, the institute, survived the testator, and was the first to take under the entail of Newmore. She died in 1872, and was succeeded by her son George, the present appellant, who is now the only person in existence who could claim to succeed under that part of the destination which I have narrated. James Falconer Gillanders, the last of these substitutes, was at the date of the trust-deed heir of entail in possession of the estate of Highfield, which he continued to hold in that character until his death in the year 1881. He was succeeded by his son George, who has disentailed the estate of Highfield, and has conveyed it to trustees for behoof of a series of heirs other than those who would have been entitled under the tailzied destination. But for that circumstance, the claim of the appellant to the character of last heir-substitute under the entail of Newmore could not have arisen.

The second part of the trust destination to which the present controversy relates I think it better to quote at length. It runs thus: "and failing the whole persons above specified, then from respect to my deceased grandfather, George Gillanders, Esquire, of Highfield, to the heir in possession of the estate of Highfield under the entail thereof for the time, and to the other heirs-substitute in said entail in the order set down in the said entail successively." These words, which exhaust the line of inheritance, were held by the Lord Ordinary "to be

a destination in favour of the persons who should possess, when that part of the destination opened the character of heirs of entail in possession of the estate of Highfield, under the Highfield entail." If that were in my opinion the true construction of the clause, I should agree with his Lordship when he goes on to say, "that being so, I think it follows that that part of the destination is no longer operative, because the Highfield entail is no longer in existence."

But it appears to me that the words in question cannot be legitimately read as importing a single substitution to that effect. Omitting the statement of the testator's motive, which cannot, in my opinion, affect their legal construction, they contain two distinct substitutions separated by the word "and," which in that connection is the precise equivalent of "whom failing." The first branch, on the failure of all the heirs previously named and the heirs-male of their bodies, calls to the succession the heir in possession for the time being under the entail of Highfield. That is the only designation given of the substitute called; and it is obvious that, since the disentail of Highfield, the substitution has become void, because there can be no heir answering the description. If that had been the last substitution contained in the trust-deed, the validity of the claim now made by the appellant would have been beyond question. But it is followed by another substitution which brings in per aversionem "the other heirs-substitute in the said entail in the order set down in said entail successively." That description brings into the Newmore line of succession by reference the heirs named in the entail of Highfield, other than those who have already failed, or other than an heir of entail in possession of Highfield who may have already succeeded to Newmore under the entail directed by the testator. It is not made a condition of the right conferred on these substitutes that an heir in possession under the entail of Highfield shall previously have succeeded under the entail of Newmore; nor is it made a condition of their right that, at the time when the succession opens to them, they must be in possession of Highfield as heirs of tailzie. All that an heir claiming under the last branch of the trust destination now requires to shew is that

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he possesses the character of an heir-substitute designated in the deed of entail, under which Highfield was held at the date of the trust-deed, and that the heirs called in priority to him by the Highfield entail have failed. The effect of that construction, as was pointed out by the appellant's counsel, is, to bring in under the last, an heir who would have taken under the preceding substitution, if the entail of Highfield had not been extinguished; but that is a result which appears to me inevitably to follow from the language used by the testator.

For these reasons I am of opinion that, although the substitution of an heir in possession of Highfield has become ineffectual, there still remains a valid substitution of the heirs called by the Highfield deed of entail; and that the judgment of the Court below must therefore be affirmed.

LORD ASHBOURNE:—

I entirely concur in the opinion expressed by my noble and learned friend Lord Watson, which I have had an opportunity of reading and considering.

LORD MACNAGHTEN:—

I am of the same opinion.

LORD SHAND:—

I have had a similar opportunity, and I entirely concur in the opinion and in the reasons which my noble and learned friend has given for the affirmance of the judgment of the Court below.

Interlocutors appealed from affirmed and the appeal dismissed with costs.

Lords' Journals, May 30, 1895.

Agents for appellant: *Loch & Co., for Dundas & Wilson, C.S., Edinburgh.*

Agents for respondent: *A. & W. Beveridge, for Hamilton, Kinnear & Beatson, W.S., Edinburgh.*

[PRIVY COUNCIL.]

LE MESURIER . . . . . PLAINTIFF;

AND

LE MESURIER AND OTHERS . . . . . DEFENDANTS.

J. C.*
1895
March 28, 29; *April* 2; *June* 29.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Matrimonial Law in Ceylon — Foreign Domicil — Divorce Jurisdiction — Matrimonial Domicil.

The matrimonial law applicable to British or European residents in Ceylon is the Roman-Dutch law as it existed in the Colony at the date of the Royal Proclamation of the 23rd of September, 1799; and that law did not contain any rule specially conferring on the local Courts divorce jurisdiction a vinculo over European spouses resident in the island, but whose marriage and domicil were in England.

Held, further, that the permanent domicil of the spouses within the territory is necessary to give to its Courts jurisdiction so to divorce a vinculo as that its decree to that effect shall by the general law of nations possess extra-territorial authority. A so-called "matrimonial domicil," said to be created by a bonâ fide residence of the spouses within the territory, of a less degree of permanence than is required to fix their true domicil, cannot be recognised as creating such jurisdiction.

Wilson v. *Wilson* (L. R. 2 P. & D. 442) approved.

APPEAL from a decree of the Supreme Court (Oct. 20, 1893) reversing a decree of the District Court of Matara (Jan. 31, 1893) in a suit brought by the appellant against the respondents, of whom the first was his wife, whereby he sued for a divorce a vinculo matrimonii on the ground of her adultery with the second, third, and fourth defendants. The District Court decreed in his favour. This decision was reversed by the Supreme Court upon the facts, with a further intimation of their opinion that the District Court had no jurisdiction to award the relief claimed.

The facts, which so far as they related to jurisdiction were undisputed, are stated in the judgment of their Lordships. They are—that the appellant resided within the jurisdiction of the Matara Court; that the marriage was solemnized in England;

* *Present* :—THE LORD CHANCELLOR, LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, and SIR RICHARD COUCH.

J.C. 1895 LE MESURIER v. LE MESURIER.

that none of the parties were domiciled in Ceylon, and that except the wife none of the respondents were resident there; that the wife was entitled to property including lands in settlement which were not in Ceylon. The issue of law as originally raised related to the jurisdiction of the District Court, and was decided in the appellant's favour on the ground that he resided within the ambit of its jurisdiction, and therefore that he was entitled to sue for divorce under sect. 597 of the Civil Procedure Code (No. 2 of 1889).

In the Supreme Court the Acting Chief Justice raised a question which had not been submitted to the District Court, namely, that no Court in Ceylon had jurisdiction to grant a divorce a vinculo in such a case as the present. His view was that by the Charter of 1801 no matrimonial relief could be given to British subjects other than was then granted by the ecclesiastical law dispensed in London; that in 1843 exclusive matrimonial jurisdiction was granted to the District Courts, but that such jurisdiction as regards Englishmen in Ceylon did not extend to granting divorce a vinculo; that power to grant such divorces to Europeans was for the first time conferred by Ordinance 6 of 1847, but was limited to marriages contracted in the island, and that all subsequent enactments which recognise the right to grant such divorces must have this limitation imported into them. He concluded as follows: "I am of opinion that no Court in Ceylon had jurisdiction. If any Court had jurisdiction it was the Court of the district in which the first defendant (i.e. the wife) resided at the time when the action was instituted."

Browne J. apparently accepted the view of the Acting Chief Justice as to the want of jurisdiction to grant a divorce a vinculo, and suggested a further difficulty arising out of the incapacity of the Court to direct a settlement of the first defendant's real property, situated out of Ceylon. As to the local jurisdiction of the Court, however, he considered that the suit was properly brought in the district where the plaintiff resided.

Mayne, for the appellant, contended that the District Court of Matara had matrimonial jurisdiction which included the power to divorce a vinculo, and that it was entitled to exercise that jurisdic-

tion notwithstanding that the parties were domiciled elsewhere and that the marriage had been contracted in England. By the law which prevailed in Ceylon up to 1801, which was the Roman-Dutch law preserved by the Proclamation of 1799 up to the Charter of 1801, every marriage could be dissolved for adultery. That charter imposed restrictions in that respect as regards the marriages of British subjects; for that charter, after vesting matrimonial jurisdiction in the Supreme Court thereby created, provided in sect. 53 that as regards British residents the ecclesiastical law then existing in England should be exercised, which of course did not include jurisdiction to divorce a vinculo. In 1833 a new charter was granted by which District Courts and the Supreme Court as now existing were constituted—the former with exclusive original jurisdiction, the latter with appellate jurisdiction; but it contained no clause which specially conferred matrimonial jurisdiction on the District Courts. Reference, however, was made to the Letters Patent of the 20th of January, 1843, and the 2nd of July, 1844; to Ordinance 12 of 1843, s. 15; Ordinance 6 of 1847, s. 29; Ordinance 11 of 1868, ss. 64, 71; Ordinance 15 of 1876, s. 15; Ordinance 1 of 1889, c. 6, ss. 64, 65; and Ordinance 2 of 1889, ss. 596, 597, 601. It was contended that the restrictive clause of the Charter of 1801 having been swept away, the District Courts established in 1833 possessed full matrimonial jurisdiction, including the power to divorce a vinculo, deriving that jurisdiction from the Proclamation of 1799, whose force was restored in 1833, and which in effect provided that the Roman-Dutch law applied to this case; that the subsequent enactments merely regulated the procedure of the Court, exercising a jurisdiction conferred by the general law of the island; and so far as they defined the limits of that jurisdiction, did so only with regard to marriages contracted within the island, leaving the exercise of their jurisdiction as regards marriages contracted elsewhere to be determined according to the general principles of law. The existence of a divorce jurisdiction in the District Court has been recognised by the subsequent legislation, some of which has been passed since the Matrimonial Court in England received the power to grant divorces a vinculo.

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Then, upon the question whether such jurisdiction was exercisable in the present case, it was first of all contended that the evidence was sufficient to entitle the appellant to the decree sought. Next, that such jurisdiction could be exercised to dissolve a marriage in England between parties there domiciled at the time of the marriage. All that was necessary to give such jurisdiction over parties who had not acquired a permanent domicil in the island was that they should have resided within the territory with such a degree of permanence as to acquire what the English and Scottish authorities recognised as a matrimonial domicil. The appellant was a resident official of the colony, and he and his wife had resided in the island from the date of the marriage to the date of suit. He referred to *Goulder* v. *Goulder* (1); *Wilson* v. *Wilson* (2); *Tollemache* v. *Tollemache* (3); *Yelverton* v. *Yelverton* (4); *Brodie* v. *Brodie* (5); *Manning* v. *Manning* (6); *Niboyet* v. *Niboyet* (7); *Harvey* v. *Farnie* (8); *Pitt* v. *Pitt* (9); *Warrender* v. *Warrender* (10); *Shaw* v. *Gould* (11); *Dolphin* v. *Robins* (12).

Bray, and *Cassel*, for the first respondent, contended that the District Court of Matara had no jurisdiction to entertain the action. As regards the Charter of 1801, it gave no power to the Supreme Court thereby established to grant divorce a vinculo in the case of British subjects; its effect was to destroy such power if it had previously existed, and to give, as regards British residents, powers which were no greater than were recognised by the then existing matrimonial law in England. Then, as regards the Charter of 1833 and the District Courts thereby established, those Courts, if they obtained any matrimonial jurisdiction at all, did not obtain the power to divorce a vinculo, nor any power at all where the defendant was not resident within the jurisdiction. Nor did Ordinance 12 of 1843, s. 13, operate to give those

(1) [1892] P. 240.
(2) L. R. 2 P. & D. 435.
(3) 1 Sw. & Tr. 557.
(4) 1 Sw. & Tr. 574; S.C. 29 L. J. (P. & M.) 34.
(5) 2 Sw. & Tr. 259.
(6) L. R. 2 P. & D. 223.
(7) 4 P. D. 1.
(8) 8 App. Cas. 43.
(9) 1 Court Sess. Cas. 3rd Series, 106; 4 Macq. App. Cas. 627.
(10) 2 Cl. & F. 488.
(11) L. R. 3 H. L. 55, 85.
(12) 7 H. L. C. 390.

Courts a power not possessed at that time by the English Ecclesiastical Courts. Ordinance 6 of 1847, s. 29, so far as the Dutch inhabitants of Ceylon were concerned, abolished the Roman-Dutch law which had been applicable to Dutch inhabitants since the Charter of 1801, and, as regards British subjects, gave power to the District Courts for the first time to dissolve marriages, but only those which had been contracted in Ceylon. The Civil Procedure Code did not give any fresh jurisdiction in that respect or enlarge that which already existed, but only regulated the exercise of such jurisdiction as previously existed. As regards the present case, the parties were domiciled in England, and the theory of matrimonial domicil contended for on the other side has never been recognised by any decision of the House of Lords. The District Court was not shewn to have had the power to grant a divorce a vinculo in this case; and if it had, such a decree could not be recognised outside the limits of the island; for the Courts of that country alone could dissolve marriage in which the parties were domiciled. Reference was made to *Scott* v. *Attorney-General* (1); Dicey on Domicil, p. 236; *Ruding* v. *Smith* (2); *Manning* v. *Manning* (3); *Tollemache* v. *Tollemache* (4). See a dictum of Lord Penzance in *Wilson* v. *Wilson* (5), cited by Sir R. Phillimore in *Niboyet* v. *Niboyet* (6); also a dictum of Lopes L.J. in *Goulder* v. *Goulder* (7): "As a general principle it may be stated that jurisdiction in matters of divorce depends upon the domicil of the parties to a marriage at the time of the commencement of the proceedings for divorce. The English Divorce Court has jurisdiction to dissolve the marriage of any parties domiciled in England at the commencement of such proceedings, and this, independently of the residence of the parties, the allegiance of the parties, the domicil of the parties at the time of the marriage, or the place where the matrimonial offence or offences have been committed." This question must be determined on principles not of English law but of international law, unless there is something in the

(1) 11 P. D. 128.
(2) 2 Hagg. Cons. 371.
(3) L. R. 2 P. & D. 226.
(4) 1 Sw. & Tr. 557.
(5) L. R. 2 P. & D. 435.
(6) 3 P. D. 59; see also the same case in appeal, 4 P. D. 1, at p. 14.
(7) [1892] P. 243.

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Dutch law contrary to those principles: *Harvey* v. *Farnie* (1); Rodenburg de Jure Conjugum, tit. i. c. 3, s. 4 (cited by Lord Westbury in *Shaw* v. *Gould* (2)); Bar's Private International Law, s. 173, Gillespie's Translation, p. 382; *Harvey* v. *Farnie* (3).

A. T. Walter, for the fourth respondent, whose case was that there was no evidence against him.

Mayne replied.

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The judgment of their Lordships was delivered by

LORD WATSON:—

In February, 1883, the appellant, who is a member of the Ceylon Civil Service, was married in England to a French lady, the leading respondent in this appeal, who will hereinafter be referred to as "the respondent." From the date of their marriage until the commencement of this suit the spouses had their principal residence in Ceylon, where the appellant was necessarily detained by his official duties. In July, 1892, he was Assistant Government Agent of the district of Matara; and on the 12th of that month he brought the present action before the District Court of Matara against his wife and three other defendants, praying for a divorce a vinculo matrimonii, and other remedies, upon the allegation that she had committed adultery with one of these defendants in the year 1887, with another of them in the year 1889, and with the third of them at various times between May, 1891, and April, 1892. Except on the last of these occasions, when the adultery was alleged to have taken place at Kandy, none of these matrimonial offences was said to have been committed within the jurisdiction of the Courts of Ceylon. The loci assigned for these acts on the two other occasions were, on the first, the steamship *Ghoorkha*, during a voyage from England to Colombo; and, on the second, the steamship

(1) 8 App. Cas., Lord Selborne L.C. at p. 57.

(2) L. R. 3 H. L. 55, 85.

(3) 6 P. D. at p. 50, dictum of Cotton L.J. with reference to his decision in *Niboyet* v. *Niboyet*.

Ravenna, during a voyage from Colombo to Marseilles, and two hotels, one at Marseilles and the other in Paris.

In her defence the respondent pleaded that the District Court had no jurisdiction to entertain the suit. Upon the merits she denied all three charges of adultery, and with respect to the first charge, pleaded alternatively that it had been condoned by the appellant. Two of the other defendants, who were alleged to have been participant in her adulterous acts on the first and third occasions, also lodged defences, denying the charges made against them, and pleaded that they were not subject to the jurisdiction of the Court. The defendant in the first charge also set up the plea of condonation.

The appellant is an Englishman by birth; and at the time when this action was instituted, although officially resident within the district of Matara, he admittedly retained, and still continues to retain, his English domicil of origin. He had previously brought a divorce suit, founded on the same charges of adultery and directed against the same parties, before the Divorce Court in England, and these proceedings appear to be still in dependence. At the time when they were cited to appear in the District Court of Matara, no one of the three persons who are co-defendants with the respondent was resident in, or was alleged by the appellant to have any connection with, the island. They are described in his plaint as "of Calcutta, India," and "of London, England."

The district judge ruled that jurisdiction to proceed in the suit was conferred upon him by sect. 597 of the Civil Procedure Code, No. 2, 1889, an enactment which their Lordships will have occasion to notice more fully. The case accordingly went to trial before him; and, on considering the evidence, he found that the first charge of adultery had been proved, but that it had been condoned by the appellant, and that the second and third charges had also been established. In respect of the latter findings, he granted a decree nisi, to become absolute in four months unless good cause were shewn against it. On appeal to the Supreme Court that order was reversed, and the appellant's suit dismissed with costs.

Acting Chief Justice Lawrie and Acting Puisne Justice

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Browne, who constituted the Court of Appeal, based their judgment upon two independent grounds. They held, in the first place, that the Courts of Ceylon had no jurisdiction to dissolve a marriage between British or European spouses resident in the island. Such jurisdiction appeared to them to be expressly excluded by sect. 53 of the Royal Charter of the 18th of April, 1801, which enacted that the jurisdiction of the Supreme Court of the island—at that time the only Court competent to try matrimonial causes—should be exercised "towards and upon all the Dutch inhabitants of the said town, fort and district, according to the laws and usages in that behalf in force at the time the said settlements, territories, and dependencies came into our possession; and, towards and upon the said British and Europeans, and licensed persons hereinbefore described, resident in any the said settlements, territories and dependencies, the Ecclesiastical Law, as the same is now used and exercised in the Diocese of London, in Great Britain." That enactment applied to British residents in Ceylon the matrimonial law of England, as it existed in the year 1801; and if it had stood unaltered, the conclusion of the learned judges would have been irresistible. They held, in the second place, that the second and third charges of adultery, which were subsequent to condonation, had not been established by the evidence.

Their Lordships, in deciding this appeal, must observe the limits which the law of Ceylon imposes upon the matrimonial jurisdiction exercisable by the tribunal before which the action was originally brought. It therefore becomes necessary to consider whether the District Court of Matara was competent to entertain the action and to pronounce a decree of divorce a vinculo. To that point, which is one of some importance to British and other European residents in the island, the arguments of counsel on both sides of the Bar were exclusively directed.

Jurisdiction in matrimonial causes, which by the Royal Charter of 1801 was vested in the Supreme Court of Judicature, has by subsequent legislation been extended to the District Courts of the island. The last of a series of enactments to the same effect is to be found in sect. 597 of the Procedure Code of 1889, which provides that "any husband or wife may present a

plaint to the District Court within the limits of which he or she, as the case may be, resides, praying that his or her marriage may, by the law applicable in this Colony to his or her case, be dissolved." The enactment, like those which preceded it, refers to procedure only, and distributes the matrimonial jurisdiction which may be competently exercised by its tribunals among the various Courts of the Colony. The judge of the District Court assumed that it gave him jurisdiction to try the present case, but it is clear that neither sect. 597 of the Code, nor previous enactments to a similar effect, empowered him to entertain any divorce suit which was not previously cognizable by the Courts of Ceylon.

If sect. 53 of the Charter of 1801, upon which the learned Judges of the Supreme Court relied, had continued in force, it would have been beyond the competency of the District Court of Matara to give the appellant a more stringent remedy than separation a mensâ et thoro. But it does not appear to have been brought under the notice of the appellate judges that the whole clauses of the Charter of 1801, including sect. 53, were revoked and annulled by the Ceylon Charter of Justice of the 18th of February, 1833. Since that date there has been no legislation regulating the jurisdiction of the Courts of Ceylon in matrimonial causes arising between British or European spouses. In these circumstances, it becomes necessary to consider, in the first place, what is the present law of the island by which such jurisdiction is regulated; and, in the second place, whether according to that law the present suit is maintainable.

The first of these questions appears to their Lordships to admit only of one answer. After the annexation of the Dutch Settlements in the Island of Ceylon to the British Crown, a commission was granted on the 19th of April, 1788, to Frederick North, appointing him to be Governor and Commander-in-Chief, and containing instructions to him with respect to the administration of justice and other matters. In pursuance of these instructions, the Governor issued a Royal Proclamation, promulgated at Colombo on the 23rd of September, 1799, which declared that the administration of justice and police was thenceforth and during His Majesty's pleasure to be exercised by all Courts

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of Judicature, civil and criminal, "according to the laws and institutions that subsisted under the ancient government of the United Provinces, subject to such deviations and alterations by any of the respective powers and authorities hereinbefore mentioned, and to such deviations and alterations as We shall by these presents, or by any future Proclamation, and in pursuance of the authorities confided to Us, deem it proper and beneficial for the purposes of justice to ordain and publish, or which shall or may hereafter be by lawful authority ordained and published."

The matrimonial law of the Colony established by the Proclamation of 1799 was superseded, or at least modified, in so far as it related to British and European residents, by the enactments of the Royal Charter of 1801. But it does not appear to their Lordships to admit of doubt that, as soon as these enactments were swept away by the legislation of 1833, the proclamation was restored to its original force, and the matrimonial law applicable to British or European residents in Ceylon again became the Roman-Dutch law which had prevailed in the Colony before its annexation.

Accordingly, the præjudicial question which their Lordships have to decide is, whether the Roman-Dutch law, or any modification of it introduced into the Colony before September, 1799, gives the Courts of the island jurisdiction to dissolve a marriage contracted in England by British subjects, who, though resident within the forum, still retain their English domicil. No authority can have a material bearing upon that point which does not relate to the dissolution of marriage; because there are unquestionably other remedies for matrimonial misconduct, short of dissolution, which, according to the rules of the jus gentium, may be administered by the Courts of the country in which spouses, domiciled elsewhere, are for the time resident. If, for instance, a husband deserts his wife, although their residence be of a temporary character, these Courts may compel him to aliment her; and, in cases where the residence is of a more permanent character, and the husband treats his wife with such a degree of cruelty as to render her continuance in his society intolerable, the weight of opinion among international jurists

and the general practice is to the effect that the Courts of the residence are warranted in giving the remedy of judicial separation, without reference to the domicil of the parties. But the considerations which justify the Courts of the residence in administering remedies for the protection of mutual rights incidental to marriage, which do not involve disruption of the marriage bond, have little or no application to proceedings taken for the purpose of putting an end to the marriage, and remanding the spouses to the condition of single persons.

In order to sustain the competency of the present suit it is necessary for the appellant to shew that the jurisdiction assumed by the district judge of Matara was derived, either from some recognised principle of the general law of nations, or from some domestic rule of the Roman-Dutch law. If either of these points were established, the jurisdiction of the District Court would be placed beyond question; but the effect of its decree divorcing the spouses would not in each case be the same. When the jurisdiction of the Court is exercised according to the rules of international law, as in the case where the parties have their domicil within its forum, its decree dissolving their marriage ought to be respected by the tribunals of every civilized country. The opinions expressed by the English common law judges in *Lolley's Case* (1) gave rise to a doubt whether that principle was in consistency with the law of England, which at that time did not allow a marriage to be judicially dissolved. That doubt has since been dispelled; and the law of England was, in their Lordships' opinion, correctly stated by Lord Westbury in *Shaw* v. *Gould* (2) in these terms: "The position that the tribunal of a foreign country having jurisdiction to dissolve the marriages of its own subjects, is competent to pronounce a similar decree between English subjects who were married in England, but who before and at the time of the suit are permanently domiciled within the jurisdiction of such foreign tribunal, such decree being made in a bonâ fide suit without collusion or concert, is a position consistent with all the English decisions, although it may not be consistent with the resolution commonly cited at

(1) Russ. & Ry. 237; S.C. 2 Cl. & F. 567. (2) L. R. 3 H. L. 85.

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the resolution of the judges in *Lolley's Case* (1)." On the other hand, a decree of divorce a vinculo, pronounced by a Court whose jurisdiction is solely derived from some rule of municipal law peculiar to its forum, cannot, when it trenches upon the interests of any other country to whose tribunals the spouses were amenable, claim extra-territorial authority.

Mr. Mayne, in his elaborate and able argument for the appellant, did not assert the existence of any special rule in the Roman-Dutch law giving jurisdiction to entertain a divorce suit in such circumstances as occur in the present case. He maintained that, in addition to jurisdiction arising from the fact of the spouses having their domicil of succession within the territory, which he admitted to be universally acknowledged, the general law of nations recognises that a concurrent and equally effective jurisdiction to divorce is created by the spouses' residence within the territory of such permanence as to constitute what has been termed a "matrimonial domicil," although not of sufficient permanence to fix their true domicil there. In support of the theory of a matrimonial domicil, as distinguished from the domicil of succession, the learned counsel relied mainly, if not exclusively, upon certain decisions by the Courts of England and Scotland, which he represented as conclusive in his favour. Their Lordships will at once proceed to examine these authorities, beginning with the English cases, which do not appear to them to be either consistent or satisfactory. The Scottish cases are not, in their Lordships' opinion, more satisfactory than the English; but, so far as they go, they have at least the merit of consistency.

The first in date of the English cases is *Tollemache* v. *Tollemache* (2), which was decided by Williams J., Martin B., and the Judge Ordinary. The suit was for divorce at the instance of the husband, who was throughout a domiciled Englishman. The parties were first married at Gretna Green, and thereafter entered into a regular marriage in London in August, 1837. From that date, with the exception of occasional visits to England and Wales, they resided continuously in Scotland;

(1) Russ. & Ry. 237; S.C. 2 Cl. & F. 567. (2) 1 Sw. & Tr. 557.

and, on the 3rd of July, 1841, the husband obtained a decree of divorce from the Scottish Courts for adultery of the wife committed in Scotland. In her answer to the English suit, which was instituted eighteen years afterwards, the wife also prayed the Court for a decree declaring her marriage with the petitioner to be dissolved. The Court granted decree of dissolution, with the observation: "Sitting here as an English Court, we cannot recognize that divorce (i.e. the Scottish) as putting an end to the marriage bond of a domiciled Englishman."

The next case in order, *Yelverton* v. *Yelverton* (1), was a suit at an alleged wife's instance for restitution of conjugal rights, which was dismissed by the Judge Ordinary. The husband who was called as respondent was not resident and had never been domiciled in England.

Their Lordships have noticed these cases because they were founded upon in the argument addressed to them. They need hardly observe that in neither of them was any question raised in regard to matrimonial domicil. In *Tollemache* v. *Tollemache* (2), it might very well have been contended that four years' residence there had given the spouses a matrimonial domicil in Scotland; but that view of the law does not seem to have occurred either to the parties or to the Bench.

In the next case, *Brodie* v. *Brodie* (3), the petitioner, being the husband, was resident, but had not his domicil in England. He had been married to the respondent in Tasmania, and left her behind him in Melbourne when he came to Great Britain. His wife never came to England, and the acts of adultery charged in his petition were committed in the Colony. In giving decree, the Court, consisting of the Judge Ordinary, with Wightman and Williams JJ., observed: "We think that the petitioner was bonâ fide resident here, not casually, or as a traveller; after he became resident here, his wife was carrying on an adulterous intercourse in Australia. He is, therefore, entitled to a decree nisi for a dissolution of his marriage." These observations go the whole length of affirming that the residence of the husband in a country where he has not a

(1) 1 Sw. & Tr. 574. (2) 1 Sw. & Tr. 557.
(3) 2 Sw. & Tr. 259.

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domicil, if such residence be not casual or that of a traveller, gives the Courts of that country divorce jurisdiction over him, and also over his wife, although she should continue to reside in the country where they both have their domicil of succession.

In *Manning* v. *Manning* (1) the Judge Ordinary dismissed a petition of divorce at the instance of an Irish husband, upon the ground that he was not a bonâ fide resident in England.

The next authority adduced for the appellant was *Wilson* v. *Wilson* (2), which their Lordships notice because of its connection with a Scottish case between the same parties to which they will have occasion to refer. At the time of their marriage in 1861, both the spouses had their domicil of origin in Scotland, and they continued to reside there until November, 1866, when the husband discovered that the lady had been guilty of adultery. He then went to England, and lived there with his mother until April, 1871, when he presented his petition to the Judge Ordinary. During its dependence, he brought an action in the Court of Session, and obtained a decree of divorce, after it had been found that he was still domiciled in Scotland. Lord Penzance, upon the evidence before him, held that the petitioner had, in April, 1871, acquired an English domicil, and he accordingly pronounced a similar decree, upon the ground that the Scottish Courts had no jurisdiction. No question as to what is called matrimonial as distinguished from true domicil was raised in the case. The petitioner was admittedly resident in England, and was found to have his domicil there; but Lord Penzance, in delivering judgment, expressed his opinion to the effect that actual domicil afforded the only true test of jurisdiction in such cases.

The last, and not the least important, of the English authorities requiring to be considered is *Niboyet* v. *Niboyet* (3). Shortly stated, the facts were these. A Frenchman and an Englishwoman were married at Gibraltar in the year 1856. In 1875 the husband went to Newcastle-on-Tyne, and continued to reside there until October, 1876, when his wife filed a petition in the Divorce Division of the High Court of Justice, alleging adultery,

(1) L. R. 2 P. & D. 223. (2) L. R. 2 P. & D. 435.
(3) 4 P. D. 1.

coupled with desertion, for two years and upwards. It was admitted that the respondent, being in the Consular service of France, had never lost his domicil of origin. The Judge Ordinary (Sir R. Phillimore) held that he had no jurisdiction to dissolve the marriage (1). On appeal, his judgment was reversed by James and Cotton L.JJ., the present Master of the Rolls (then Brett L.J.) dissenting. The main reason assigned for their decision by the learned judges of the majority was, that, before the Act of 1857 became law, the petitioner would have been entitled to sue her husband in the Bishop's Court, although he was not domiciled in England, and to ask either for restitution of conjugal rights, or for a divorce a mensâ et thoro, and in either case for proper alimony; and consequently that, after the Act of 1857 passed, jurisdiction in divorce might be exercised in the same circumstances. There appears to their Lordships to be an obvious fallacy in that reasoning. It is not doubtful that there may be residence without domicil sufficient to sustain a suit for restitution of conjugal rights, for separation, or for aliment; but it does not follow that such residence must also give jurisdiction to dissolve the marriage. Their Lordships cannot construe sect. 27 of the Act of 1857 as giving the English Court divorce jurisdiction in all cases where any other matrimonial suit would previously have been entertained in the Bishop's Court.

The only Scottish authority cited by Mr. Mayne was *Pitt* v. *Pitt* (2). But, in order to ascertain whether, and if so to what extent, the doctrine of matrimonial domicil is regarded in Scotland as a good foundation for the exercise of divorce jurisdiction, their Lordships find it necessary to refer to the other cases in which the doctrine has been applied or discussed by a Scottish Court. Although the Matrimonial Courts of Scotland had previously exhibited no lack of ingenuity in discovering grounds for exercising divorce jurisdiction in cases where the parties had their domicil elsewhere, it was not until the year 1862 that the idea of a matrimonial domicil, other than true domicil, and resting upon a somewhat indefinite permanency of

(1) 3 P. D. 52.
(2) 1 Court Sess. Cas. 3rd Series, 106; 4 Macq. App. Cas. 627.

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residence, which had been foreshadowed in *Shields* v. *Shields* (1) was first formulated and applied in *Jack* v. *Jack* (2).

In that case both spouses were Scottish, and after their marriage they continued to live together in Scotland until the year 1855, when the husband went to America, and became a minister of the gospel at Newburgh, in the State of New York, the wife continuing to reside in Scotland. Four and a half years afterwards the husband, who was still in America, brought his action founded on adultery committed by his wife in Scotland. It was met by the plea of no jurisdiction, and was heard before twelve judges of the Court of Session, who upheld the jurisdiction of the Court by a majority of eleven to one. The late Lord President Inglis (at that time Lord Justice Clerk), went upon the ground of matrimonial domicil, which he thus defined: "The true inquiry, I apprehend, in every such case is, where is the home or seat of the marriage for the time; where are the spouses actually resident if they be together; or if from any cause they are separate, what is the place in which they are under obligation to come and renew, or commence, their cohabitation as man and wife?" Five other judges took substantially the same view expressed in different language. Lord President McNeill, with two of their Lordships, concurred in the judgment, holding that the domicil of the married pair had never been transferred to any other country. Lord Kinloch and Lord Jerviswoode intimated their opinion that the true domicil of the husband was the only test of jurisdiction, but held that the husband was not shewn to have lost his Scottish domicil. Lord Deas held that there was no jurisdiction, because the pursuer had acquired a new domicil in the United States. With regard to the matrimonial domicil, which found favour with some members of the Court, his Lordship observed: "Neither can I solve this case by what has been sometimes called the domicil of the marriage. The phraseology appears to me to be calculated to mislead. It is figurative, and wants judicial precision. There is no third domicil involved apart from the domicil of the husband and the domicil of the wife. Domicil belongs exclusively to persons.

(1) 15 Court Sess. Cas. 2nd Series, 142.

(2) 24 Court Sess. Cas. 2nd Series, 467.

Having ascertained the domicil of the husband and the domicil of the wife, the inquiry into domicil is exhausted."

The doctrine of matrimonial domicil, as explained by the Lord Justice Clerk in *Jack* v. *Jack* (1), was subsequently applied by his Lordship and the other judges of the Second Division in *Hume* v. *Hume* (2), where they granted a decree of divorce for adultery to a wife whose husband had been in America for seventeen years, and was living with a woman whom he had married there.

The next case, which is also the last case in which the so-called matrimonial domicil has been made the ground of divorce jurisdiction in Scotland, is *Pitt* v. *Pitt* (3), already mentioned. In that case Colonel Pitt, a domiciled Englishman and married there, went to Scotland, chiefly for the purpose of avoiding his creditors, leaving his wife in London. With the exception of occasional visits in disguise to relatives in England, he continued to reside in the Hebrides for six years, and then brought an action for divorce on the ground of adultery. His wife, who had never been in Scotland, appeared to defend, and pleaded that, her husband being domiciled in England, the Court of Session had no jurisdiction. After proof, the Lord Ordinary (Kinloch) found that the pursuer had acquired a domicil in Scotland, and gave him decree of divorce. His decision was affirmed by the Second Division of the Court, who, differing from him on that point, came to the conclusion that the pursuer still retained his English domicil, but held that his residence in Scotland had been of such a character as to make that country the domicil of the marriage. On appeal to the House of Lords, these judgments were reversed, and the defender assoilzied from the conclusions of the action. At the bar of the House the pursuer's counsel (Sir R. Phillimore, then Queen's Advocate, and Sir Hugh Cairns) intimated that "they had come to the resolution of abandoning as untenable the ground on which the Second Division of the Court of Session had rested their decision, namely, that divorce a vinculo might be validly granted to

(1) 24 Court Sess. Cas. 2nd Series, 467.

(2) 24 Court Sess. Cas. 2nd Series, 1342.

(3) 1 Court Sess. Cas. 3rd Series, 106; 4 Macq. App. Cas. 627.

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strangers not domiciled, though temporarily resident, within the jurisdiction." They accordingly confined their argument in support of the judgments appealed from to an endeavour to shew that Colonel Pitt had acquired a Scottish domicil. The Lord Chancellor (Westbury), in delivering judgment, referred to the course taken by counsel in these terms: "If he was not domiciled in Scotland to all intents and purposes, having relinquished his original domicil and acquired a domicil in Scotland, then by the concession of the counsel at the bar, a concession which is I trust in the opinion of your Lordships quite in accordance with the law of the case, it will be impossible to maintain the order which has been pronounced in the Court below." Neither Lord Chelmsford nor Lord Kingsdown, who sat with the Lord Chancellor, took any exception to that statement.

After the observations made by Lord Westbury in *Pitt* v. *Pitt* (1), from which the other noble and learned Lords present did not express dissent, it would be very rash to affirm that, according to the law of Scotland, mere matrimonial domicil affords any ground for jurisdiction to divorce. There is no trace of the doctrine to be found in the Institutes of Scottish Law, or in the earlier decisions of the Court; and, during the thirty-one years which have elapsed since the case of *Pitt* v. *Pitt* (1) was decided by the House of Lords, the divorce jurisdiction of the Court of Session has never been exercised on that ground. It has, however, been twice referred to since that date, first in the year 1872, in *Wilson* v. *Wilson* (2), and again, ten years afterwards, in *Stavert* v. *Stavert*. (3)

In *Wilson* v. *Wilson* (2) the parties were the same as in the English case already noticed. On his finding that his English suit was met by the plea that he retained his Scottish domicil, the husband brought an action of divorce in the Court of Session, and was there met by the plea that he had acquired an English domicil. The Lord Ordinary, whose judgment was affirmed by the First Division, found that he was domiciled in Scotland, and, notwithstanding the dependence of the English suit, granted

(1) 1 Court Sess. Cas. 3rd Series, 106; 4 Macq. App. Cas. 627.

(2) 10 Court Sess. Cas. 3rd Series, 573.

(3) 9 Court Sess. Cas. 4th Series, 519, 529.

decree of divorce. In the note appended to his judgment the Lord Ordinary (Ormidale) observed that "having regard to the judgment in the House of Lords in *Pitt* v. *Pitt* (1) in April, 1864, any such thing as a consistorial or matrimonial domicil must be held to be unknown to the law." In delivering the judgment of the Inner House, Lord President Inglis said: "In cases of divorce, jurisdiction depends upon domicil, and the domicil in this case is here. And if the domicil, and consequently the jurisdiction is here, they can be nowhere else. I have always been of opinion, as I expressed myself in the case of Pitt, and I have never seen any reason to change that opinion, that for the purposes of divorce there may be a matrimonial domicil, differing from the absolute domicil which will rule succession." Their Lordships find it difficult to reconcile these statements. If there really were such a thing as a matrimonial domicil recognised by general law, it is not easy to comprehend why the jurisdiction could be nowhere else than in Scotland. On that assumption, the pursuer had certainly acquired a matrimonial domicil in England by five years' continuous residence there; and, in deference to international rules, the Scottish Court ought not to have entertained the same lis which was already pending in the proper Court of the matrimonial domicil.

In *Stavert* v. *Stavert* (2) the Lord Ordinary refused to grant a divorce to a foreigner who had come to Scotland with his paramour, and had lived there for five months, with the sole object of obtaining a divorce from his wife. The pursuer maintained, alternatively, that he had acquired either a real domicil or a matrimonial domicil in Scotland. The Lord President (Inglis) held that he was possessed of neither; and with reference to matrimonial domicil his Lordship said: "There has been a good deal of speculation on this point, but fortunately it is not necessary to deal with the question here. It has not yet been decided in the Court of last resort." Lord Deas reiterated the views which he had expressed in *Pitt* v. *Pitt* (1); and Lord Shand, dealing with the same subject, said: "I have great difficulty in

(1) 1 Court Sess. Cas. 3rd Series, 106; 4 Macq. App. Cas. 627.

(2) 9 Court Sess. Cas. 4th Series, 529.

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finding any sound principle of general application which would induce foreign Courts to give weight to a decree in this country based on such jurisdiction; and I have, further, great difficulty in finding any rule or standard as to the nature and extent of the residence which would be necessary or sufficient to found such a jurisdiction."

When carefully examined, neither the English nor the Scottish decisions are, in their Lordships' opinion, sufficient to establish the proposition that, in either of these countries, there exists a recognised rule of general law to the effect that a so-called matrimonial domicil gives jurisdiction to dissolve marriage.

Tollemache v. *Tollemache* (1), which was decided by three judges in 1859, shortly after the passing of the Divorce Act, appears to be an authority to the contrary. The learned judges sustained the jurisdiction of the English Court, which was the forum of the husband's domicil, and disregarded as incompetent a decree of the Court of Session dissolving his marriage, although he had a matrimonial domicil in Scotland, where he had bonâ fide resided for four years with his wife, neither casually nor as a traveller. Then in *Brodie* v. *Brodie* (2), in the year 1861, three learned judges decided the opposite, holding that residence of that kind, which had been found in *Tollemache* v. *Tollemache* (1) to be insufficient to give jurisdiction to a Scottish Court where the domicil was English, was nevertheless sufficient to give jurisdiction to themselves where the domicil was Australian. In *Wilson* v. *Wilson* (3) jurisdiction was sustained by Lord Penzance upon the ground that the petitioner had acquired an English domicil, with an expression of opinion by his Lordship that such domicil ought to be the sole ground of jurisdiction to dissolve marriage. In *Niboyet* v. *Niboyet* (4) Sir Robert Phillimore expressed a similar opinion, and dismissed the suit of the petitioner, who had a matrimonial domicil in England which fully answered the definition of such domicil given either in *Brodie* v. *Brodie* (2) or in *Pitt* v. *Pitt* (5). His decision was, no doubt, reversed in the Court of Appeal; but it had the support of the present Master of

(1) 1 Sw. & Tr. 557.
(2) 2 Sw. & Tr. 259.
(3) L. R. 2 P. & D. 435.
(4) 4 P. D. 1.
(5) 1 Court Sess. Cas. 3rd Series, 106; 4 Macq. App. Cas. 627.

the Rolls, and their Lordships have already pointed out that the judgment of the majority was mainly, if not altogether, based upon a reason which will not bear scrutiny.

The Scottish decisions appear to their Lordships to be equally inefficient to shew that a matrimonial domicil is a recognised ground of divorce jurisdiction. So far as they go, they are consistent enough, but the doctrine appears to have had a very brief existence, because the three cases in which it was applied all occurred between the 7th of February and the 14th of December in the year 1862. Although, owing to the course taken by the appellant's counsel in *Pitt* v. *Pitt* (1), the House of Lords had not an opportunity of expressly deciding the point, there can be little doubt that the approval of the course adopted by counsel, which was openly expressed by Lord Westbury, has had the effect of discrediting the doctrine in Scotland; and it is impossible to affirm that the Court of Session would now give effect to it. The eminent judge who, in 1862, was the first to give a full and clear exposition of the doctrine of matrimonial domicil, spoke of it, in the year 1882, not as a doctrine accepted in the law of Scotland, but as matter of speculation.

It is a circumstance not undeserving of notice that the learned judges, whether English or Scottish, who have expressed judicial opinions in favour of a matrimonial domicil, have abstained from reference to those treatises on international law which are generally regarded as authoritative, in the absence of any municipal law to the contrary. The reason for their abstinence is probably to be found in the circumstance that nothing could be extracted from these sources favourable to the view which they took. Their Lordships are of opinion that in deciding the present case, on appeal from a Colony which is governed by the principles of the Roman-Dutch law, these authorities ought not to be overlooked.

Huber (Lib. 1, tit. 3, s. 2, De Confl. Leg.) states the rule of international law in these terms: "Rectores imperiorum id comiter agunt, ut jura cujusque populi intra terminos ejus exercita teneant ubique suam vim, quatenus nihil potestati aut juri alterius imperantis ejusque civium præjudicetur." That passage was cited with approbation by Lord Cranworth and Lord Westbury

(1) 1 Court Sess. Cas. 3rd Series, 106; 4 Macq. App. Cas. 627.

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in *Shaw* v. *Gould* (1). To the same effect, but in language more pointed, is the text of Rodenburg (De Stat. Divers. tit. 1, c. 3, s. 4), cited in the same case by Lord Westbury: "Unicum hoc ipsa rei natura ac necessitas invexit, ut cum de statu et conditione hominum quæritur, uni solummodo Judici, et quidem Domicilii, universum in illâ jus sit attributum." The same rule is laid down by Bar, the latest Continental writer on the theory and practice of international private law. He says (sect. 173, Gillespie's Translation, p. 382), "that in actions of divorce—unless there is some express enactment to the contrary—the judge of the domicil or nationality is the only competent judge." And he adds: "A decree of divorce, therefore, pronounced by any other judge than a judge of the domicil or nationality, is to be regarded in all other countries as inoperative."

There can, in their Lordships' opinion, be no satisfactory canon of international law, regulating jurisdiction in divorce cases, which is not capable of being enunciated with sufficient precision to ensure practical uniformity in its application. But any judicial definition of matrimonial domicil which has hitherto been attempted has been singularly wanting in precision, and not in the least calculated to produce a uniform result. The definitions given in *Brodie* v. *Brodie* (2) and in *Pitt* v. *Pitt* (3) appear to their Lordships to be equally open to that objection. Bonâ fide residence is an intelligible expression, if, as their Lordships conceive, it means residence which has not been resorted to for the mere purpose of getting a divorce which was not obtainable in the country of domicil. Residence which is "not that of a traveller" is not very definite; but nothing can be more vague than the description of residence which, not being that of a traveller, is not to be regarded as "casual." So also, the place where it is the duty of the wife to rejoin her husband, if they happen to be living in different countries, is very indefinite. It may be her conjugal duty to return to his society although he is living as a traveller, or casually, in a country where he has no domicil. Neither the English nor the Scottish definitions, which are to be found in the decisions already

(1) L. R. 3 H. L. 72, 81.
(2) 2 Sw. & Tr. 259.
(3) 1 Court Sess. Cas. 3rd Series, 106; 4 Macq. App. Cas. 627.

referred to, give the least indication of the degree of permanence, if any, which is required in order to constitute matrimonial domicil, or afford any test by which that degree of permanence is to be ascertained. The introduction of so loose a rule into the jus gentium would, in all probability, lead to an inconvenient variety of practice, and would occasion the very conflict which it is the object of international jurisprudence to prevent.

Their Lordships attach great weight to the consideration that the theory of matrimonial domicil for which the appellant contends has never been accepted in the Court of last resort for England and Scotland. The matter does not rest there; because the theory is not only in direct opposition to the clear opinion expressed by Lord Westbury in *Pitt* v. *Pitt* (1), but appears to their Lordships to be at variance with the principles recognised by noble and learned Lords in *Dolphin* v. *Robins* (2) and in *Shaw* v. *Gould* (3). It is true that in these cases, and especially in *Dolphin* v. *Robins* (2), there was ground for holding that the spouses had resorted to a foreign country and a foreign tribunal in order to escape from the law and the Courts of their English domicil. But in both the international principle, upon which jurisdiction to dissolve a marriage depends, was considered and discussed; and the arguments addressed to their Lordships in favour of matrimonial domicil by the learned counsel for the appellant appear to them to be at variance with the weighty observations which were made by noble and learned Lords in these cases. In *Dolphin* v. *Robins* (2) Lord Cranworth stated that "it must be taken now as clearly established that the Scotch Court has no power to dissolve an English marriage, where, as in this case, the parties are not really domiciled in Scotland, but have only gone there for such a time as, according to the doctrine of the Scotch Courts, gives them jurisdiction in the matter." In *Shaw* v. *Gould* (3) the dicta of noble and learned Lords upon the point raised in this appeal were even more emphatic. Lords Cranworth and Westbury expressed their entire approval of the doctrine laid down by

(1) 1 Court Sess. Cas. 3rd Series, 106 4 Macq. App. Cas. 627.

(2) 7 H. L. C. 390.

(3) L. R. 3 H. L. 55.

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Huber and Rodenburg in those passages which have already been cited. Their Lordships did not go the length of saying that the Courts of no other country could divorce spouses who were domiciled in England; but they held that the Courts of England were not bound, by any principle of international law, to recognise as effectual the decree of a foreign Court divorcing spouses who, at its date, had their domicil in England. The other noble and learned Lords who took part in the decision of *Shaw* v. *Gould* (1) were Lords Chelmsford and Colonsay. Lord Chelmsford did not express any opinion upon the subject of matrimonial domicil. Lord Colonsay rested his judgment upon the fact that the spouses had resorted to Scotland for the very purpose of committing a fraud upon the law of their English domicil; but he did indicate an opinion that, in the absence of such fraudulent purpose, they might possibly have obtained a divorce in Scotland, after a residence in that country which was insufficient to change their domicil of succession.

Their Lordships have in these circumstances, and upon these considerations, come to the conclusion that, according to international law, the domicil for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage. They concur, without reservation, in the views expressed by Lord Penzance in *Wilson* v. *Wilson* (2) which were obviously meant to refer, not to questions arising in regard to the mutual rights of married persons, but to jurisdiction in the matter of divorce: "It is the strong inclination of my own opinion that the only fair and satisfactory rule to adopt on this matter of jurisdiction is to insist upon the parties in all cases referring their matrimonial differences to the Courts of the country in which they are domiciled. Different communities have different views and laws respecting matrimonial obligations, and a different estimate of the causes which should justify divorce. It is both just and reasonable, therefore, that the differences of married people should be adjusted in accordance with the laws of the community to which they belong, and dealt with by the tribunals which alone can administer those laws. An honest adherence to this principle, moreover, will preclude the scandal which arises when

(1) L. R. 3 H. L. 55. (2) L. R. 2 P. & D. 442.

a man and woman are held to be man and wife in one country and strangers in another."

Their Lordships will, therefore, humbly advise Her Majesty to affirm the order appealed from. The appellant must pay to the first and fourth respondents their costs of this appeal.

Solicitor for appellant: *J. J. Freeman.*
Solicitors for first respondent: *Lewis & Lewis.*
Solicitors for fourth respondent: *Maynard & Son.*

[HOUSE OF LORDS.]

H. L. (E.) 1895 *May* 10.

D. DAVIS & SONS, LIMITED . . . . APPELLANTS;

AND

THE TAFF VALE RAILWAY COMPANY RESPONDENTS.

Railway Company—Construction of Local and Personal Act—Forwarding of Traffic—Statutory Obligation enforceable by Public—Group Rates—Railway and Canal Traffic Act 1888 (51 & 52 *Vict. c.* 25) *s.* 29.

A clause in a railway company's special Act limiting the rates for certain traffic—the result of a parliamentary contest between two railway companies—has the effect, not merely of a contract between the two companies, but of a statutory obligation which may be enforced by any person chargeable with the rates for such traffic.

The B. Railway Company promoted a Bill in Parliament to give them (inter alia) running powers over part of the T. Railway Company's system with which the B. Company's line formed junctions. The Bill was passed into an Act without the running powers but with a clause enacting that the T. Company should forward traffic destined for or coming from the B. Company's line, at rates per mile not greater than the lowest rate which should for the time being be charged by the T. Company for like traffic between certain places. The T. Company forwarded coal for the appellants destined for the B. Company's line, charging rates in excess of the limit imposed by that clause in the B. Company's Act, but within the maximum allowed by the T. Company's special Acts, and sued the appellants for the amount:—

Held (Lord Morris dissenting), that the obligations imposed by that clause were not merely contractual as between the two companies, but were statutory obligations for the benefit of and enforceable by consignors of traffic, and that the appellants could set up the clause as a defence to that part of the claim which exceeded the limit.

The decision of the Court of Appeal ([1894] 1 Q. B. 43) reversed.

By Lord Watson: The power conferred by sect. 29 of the Railway and Canal Traffic Act 1888 (51 & 52 Vict. c. 25) to fix group rates "notwithstanding any provision in any general or special Act," cannot affect the rate chargeable, under express statutory provisions, for the conveyance of traffic to any terminus which is not included in the group.

IN 1888 the Barry Dock and Railways Company promoted a Bill in Parliament to give them (inter alia) compulsory running powers over portions of the Taff Vale Railway Company's system with which the Barry Company's line formed junctions. In the

result a clause (sect. 23) was inserted in the Barry Dock and Railways Act 1888 (51 & 52 Vict. c. clxxxii.) as follows :—

Sect. 23: "(1.) The Taff Vale Railway Company shall punctually and regularly forward and afford all reasonable facilities for goods and mineral traffic destined for or coming from the undertaking of the company" (i.e. the Barry Company) "from or to Treforest or any place northward thereof, at rates per mile not greater than the lowest rate which shall for the time being be charged by the Taff Vale Railway Company for like traffic to or from the docks at Cardiff, Penarth or Barry, and shall deliver all such traffic into and take the same from the company's sidings as regards all traffic coming from or destined for Hafod or any place westward thereof at Hafod, and as regards other traffic at Treforest, without any terminal or other charge in respect thereof but with such bonus (if any) in respect of traffic exchanged at Hafod as in default of agreement between the Taff Vale Railway Company and the company shall be from time to time determined on the application of either of them by the Railway Commissioners sitting as arbitrators having regard to all the circumstances of the case and to the following proviso. Provided that where any such traffic shall be carried on the Taff Vale Railway for a less distance than four miles the Taff Vale Railway Company shall be entitled to charge in respect of such traffic as if it were carried on their railway for a distance of four miles and the company shall in all respects be placed on at least as favourable a footing as any other company with regard to traffic exchanged with the Taff Vale Railway Company.

"(2.) The Taff Vale Railway Company shall not (except with the consent of the company under their common seal) use the railway authorized by 'The Cardiff Penarth and Cadoxton-juxta-Barry Junction Railway Act 1885' for mineral traffic other than local traffic.

"(3.) If at any time on application made by the company to the Railway Commissioners sitting as arbitrators the said Commissioners shall decide that the Taff Vale Railway Company have failed to give any of the facilities herein provided for and shall not within reasonable time after notice have remedied such failure, or if the Taff Vale Railway Company use the Cardiff

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Penarth and Barry Railway contrary to the provisions of this Act, or in case the Cardiff Penarth and Barry Junction Railways Company shall use or permit to be used their railway for the conveyance of mineral traffic other than for local traffic, then the company may run over and use with their engines carriages and waggons and officers and servants whether in charge of any engines or trains or for other purposes and for the purposes of their traffic of every description the railways and stations following (that is to say):

"So much of the railways belonging to or leased or worked by the Taff Vale Railway Company as is situate to the northward or westward of the termination of railway No. 7 authorized by the Act of 1884;

"Together with all stations on the said portions of railway and all roads platforms points signals water water-engines engine-sheds standing room for engines booking and other offices sidings junctions machinery works and conveniences of or connected with the said portions of railway and stations.

"Provided always that if and whenever the company shall exercise the running powers by this section conferred the Taff Vale Railway Company shall during the period of such exercise be relieved and discharged from any obligation under this section to deliver traffic to the company at Hafod or Treforest and from any restrictions as to the use of the Cardiff Penarth and Barry Railway."

The appellants owned collieries in the Rhondda Valley. Coal passing from their collieries to the Barry Company's line was carried from the collieries over the Taff Vale Company's line to the junctions at Treforest and Hafod (north of Treforest) and there delivered to the Barry Company for conveyance to the Barry Dock and elsewhere. The Taff Vale Company having brought an action against the appellants for rates for the carriage of goods &c. between the appellants' collieries and the junctions, the appellants in defence contended that the Taff Vale Company had charged rates which, though within the maximum allowed by the Taff Vale Company's Acts, were in excess of the rates permitted by sect. 23 of the Barry Company's Act 1888.

Day J., who tried the action without a jury, held (1.) that the

rates were not in excess of the limit imposed by sect. 23; and (2.) that sect. 23 was intended not for the benefit of the public but only for the protection of the Barry Company, and that the appellants could not avail themselves of it against the plaintiffs' claim. His Lordship gave judgment for the plaintiffs for an amount to be afterwards ascertained.

The Court of Appeal (Lord Esher M.R., Lopes and Kay L.JJ.) affirmed the decision of Day J. upon the second ground, giving no opinion upon the first (1).

Feb. 25. Sir *R. E. Webster* Q.C. and *Moulton* Q.C. (*Joseph Shaw* with them) for the appellants, were directed to confine their arguments to the second point:—

The obligations imposed by sect. 23 are not merely contractual as between the Barry Company and the Taff Vale Company, but were inserted for the benefit of the public and of traders. The Barry Company were seeking absolute compulsory running powers over the Taff Vale system, and in lieu of granting those powers sect. 23 was inserted. In these matters it is the duty and practice of Parliament to consider the interests of the public as paramount. Even assuming that the section was passed for the protection of the Barry Company, any member of the public aggrieved by a breach of the statutory obligations could avail himself of the section. The right to apply to the railway commissioners and to exercise running powers over the Taff Vale system upon failure of the Taff Vale Company to give reasonable facilities is confined to the Barry Company and affords no argument against the appellants' contention. If that contention is wrong the public have no remedy for a breach of the statutory obligations imposed by sect. 23. [They referred to *Earl of Shrewsbury* v. *Scott* (2); *Holborn Union* v. *St. Leonard, Shoreditch* (3); *Pryce* v. *Monmouthshire Canal and Railway Companies* (4); *Saunders* v. *Holborn District Board of Works* (5); *Herron* v. *Rathmines and Rathgar Improvement Commissioners* (6); *Brown* v. *Great Western Railway Company* (7).]

(1) [1894] 1 Q. B. 43.
(2) 6 C. B. (N.S.) at pp. 157, 218.
(3) 2 Q. B. D. 145.
(4) 4 App. Cas. 197.
(5) [1895] 1 Q. B. 64.
(6) [1892] A. C. 498.
(7) 9 Q. B. D. 744.

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Balfour Browne Q.C. and *W. J. Noble* for the respondents:—

Sect. 23 only establishes a code between the two companies, giving no rights to unnamed third parties: it is treated as a contract by Lord Herschell L.C. in *Barry Railway Company* v. *Taff Vale Railway Company* (1). From beginning to end of the statute there is no recognition of a trader's right of complaint, and the case is governed by *Atkinson* v. *Newcastle Waterworks Company* (2): see Lord Cairns's judgment. The mere fact that the public may be affected by the conduct inter se of the companies gives no right of action to a particular trader. In *Countess of Rothes* v. *Kirkcaldy Waterworks Commissioners* (3) provisions in a local and personal Act are described as a contract. The question is not one of rates paid by the public, as the total of the rates is unaffected. The rate is in effect a through rate, and the real issue is the division between the companies of an unchanging total, with which the public have nothing to do. It cannot be supposed that the Legislature intended by a clause inserted in another company's Act to repeal those parts of the Taff Vale Company's Acts which empowered them to charge the rates sued for in this action. The only remedy for a breach of sect. 23 is an application to the Railway Commissioners, under sect. 23 or under the Railway and Canal Traffic Act 1888.

Sir *R. E. Webster* Q.C. replied, and the case stood over for argument on the question whether the rates charged were in excess of the limit imposed by sect. 23. On March 11 that question was argued by Sir *R. E. Webster* Q.C. and *Moulton* Q.C. (*Joseph Shaw* with them) for the appellants; and *Balfour Browne* Q.C. and *W. J. Noble* for the respondents.

The House took time for consideration.

May 10. LORD HALSBURY:—

My Lords, this was an action in which the Taff Vale Railway Company sued the consignors of coal for the carriage of coal, and there was no dispute that the amount of coal carried was

(1) [1895] 1 Ch. 128. (2) 2 Ex. D. 441.
(3) 7 App. Cas. 694, 707.

accurately claimed to have been carried; but it was contended that the rates at which the coals were charged were excessive. The Taff Vale Railway Company had charged the rates within their maximum tolls as originally permitted by the Legislature, but beyond what was permitted by a later statute (to be presently stated) if that statute limited the power of the Taff Vale Railway Company to charge, provided that statute could be insisted on by the consignors of the coals.

The action was tried before Day J., who decided in favour of the Taff Vale Railway Company upon two grounds: First, that upon the true construction of the Act to be presently referred to, the terminus ad quem was not to be ascertained by measuring the distance—in short, not by a mileage rate; but that Cardiff, Penarth, and Barry were to be treated as one terminus, as being a grouped district, and that, therefore, there was no excess in the rate charged. Secondly, the learned judge held that the Act relied upon by the consignors was only intended to give legislative sanction to a contract between the two companies to which the traders, the consignors of the coals, were no parties, and that, therefore, they could not insist upon its provisions, and that if it did give the traders any ground of complaint it must be insisted upon before the Railway Commissioners, and could not be made the ground of defence in a court of law against the right of the Taff Vale Railway Company to charge their full tolls.

The Court of Appeal did not deal with the first point at all, but they affirmed the judgment of Day J. This is an appeal to your Lordships from that judgment, and the question now in debate seems to me to resolve itself into two somewhat simple propositions.

While I certainly do not question what the Master of the Rolls so emphatically declares, that we are entitled to look at the circumstances (a proposition which Mr. Moulton declares he never questioned), I do not see that we gain very much light here if we do look at the circumstances, beyond this, that two possibly competing railways were before Parliament, and Parliament enacted certain provisions, which it is now our task to construe.

The first question which seems to be involved in the judgment

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of Day J., though the last treated, is, that even supposing the rate charged to be excessive, the proper jurisdiction to apply to is that of the Railway Commissioners, and that the excess cannot properly be made the subject of debate in an ordinary court of law.

My Lords, I notice this ground to clear my way for dealing with the questions I have enumerated, since I think it is covered by authority which I think your Lordships would be reluctant to shake. Very similar words came under review in *Great Western Railway Company* v. *Railway Commissioners* (1). There Lord Bramwell, when Lord Justice of Appeal, pointed out that where the complaint is that too much had been charged by the carrier the ordinary Courts are the proper tribunal to decide such a question, and in that case Field J. and Manisty J., Lord Bramwell, the present Master of the Rolls, and Cotton L.J. actually restrained, by prohibition, the Railway Commissioners from entertaining the matter where it only raised the question of an excessive rate being charged, since that was a matter which might and ought to be determined in an ordinary court of law. "I think," says Lord Bramwell, "there is a sort of presumption against the Railway Commissioners having jurisdiction in this matter, since it is quite certain that if there have been overcharges the moneys paid in excess can be recovered back by the person overcharged by the company."

It is obvious here to remark that the company is suing for an amount in a court of law which, if the objection insisted on by the trader is a good one, is not due, and therefore it would be impossible to contend upon the hypothesis that the charge is excessive that the Court had not jurisdiction to determine that question.

That brings me to the question, first, with reference to the excess in part of the charge. One obligation of the Taff Vale Railway Company is in respect of the rates. "They are to afford facilities at rates *per mile* not greater," &c. What can be the meaning of rates per mile? The words are inconsistent with a group charge which shall be the same to any distance within a group. The two things are absolutely, to my mind, inconsistent

(1) 7 Q. B. D. 182, 193.

with each other. Of course, it is a totally different proposition to say that when the Legislature has fixed a terminus ad quem the mileage rate is only supposed to extend to that one place, at whatever point of that one place the goods may be delivered. But to me it seems impossible to contend that when the Legislature speaks of Cardiff, Penarth, or Barry, it means to treat all of these places as if they constituted but one place. They are three different places; they are at various distances from the point from which traffic is to be carried; and independently of the objection that you must strike the disjunctive "or" out of the statute, and read "and" instead, it seems an absurd incongruity to be applying a mileage rate to places differing in distance. Assuming there is to be no group charge, what part of Cardiff, what part of Penarth, what part of Barry is to be taken as the point of arrival and delivery is not now before us, and I do not express any opinion.

That brings me to the question whether the Act does in truth constitute a contract between the two companies giving no right except to each other, and therefore not justifying the trader in refusing to pay the amount demanded. Now, it seems to me that there is a very obvious answer to the argument that the 23rd section of the Act constitutes merely a contract between the companies. It is not a contract; it is not, to my mind, even like a contract; it bears no analogy to a contract. It is an express enactment which imposes an obligation on the Taff Vale Railway Company to charge certain rates; it is immaterial what the terms are upon which these rates are to be charged; we are now construing the statutory obligation; and if the Taff Vale Railway Company have done the thing which the Legislature has contemplated they might do, and which, if I am right in what I have said before, they have done, then their right to charge more than the lowest rate, which for the time being they have charged for like traffic to or from the docks at Cardiff, Penarth, or Barry, has ceased, and the Legislature has prohibited them from doing it. It would be strange indeed if this be true, that a trader sued for the higher charge should not be able to set up the unlawful character of the excess.

My Lords, the words seem to me to be plain, the obligation is

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to "charge the rates." This is a matter not between the two companies—though, of course, when you are dealing with two competing companies it affects the two companies very much—but the obligation is to charge the prescribed rates and no more, and rates must be charged to traders and not to the other company.

It is said that these are private Acts. So they are: they are Acts which give great powers, and in giving which the Legislature has generally been careful to look to the rights of the public. It would be a very singular course of legislation to commit the interests of the traders of the district to be dealt with by two railway companies, so that if they agreed the private trader should have no remedy. Conveyance of goods by a railway company established by Act of Parliament is a public right, and the obvious meaning, to my mind, of the whole of these arrangements is that unless the Taff Vale Railway Company carry at the rates which I have described as the prescribed rates, they shall have a competing line permitted; but this does not in the least degree interfere, in my mind, with the remedy of the trader himself, who when he has been overcharged should refuse to pay, or recover back when he has paid an overcharge prohibited by the Act of Parliament.

My Lords, for these reasons I move that this appeal be allowed, that the amount should be properly ascertained in the Queen's Bench Division, and that the respondents should pay all the costs both here and in the Courts below.

LORD WATSON:—

My Lords, sect. 23 of the Barry Dock and Railways Act 1888 enacts (inter alia) that the Taff Vale Company, the respondents in this appeal, "shall punctually and regularly forward and afford all reasonable facilities for goods and mineral traffic destined for or coming from the undertaking of the company from or to Treforest, or any place northward thereof, at rates per mile not greater than the lowest rate which shall for the time being be charged by the Taff Vale Railway Company for like traffic to or from the docks at Cardiff, Penarth, or Barry, and shall deliver all such traffic into and take the same from the

company's sidings as regards all traffic coming from or destined for Hafod, or any place westward thereof, at Hafod." It also provides that the Taff Vale Company shall receive from the Barry Company a bonus to be fixed by agreement or arbitration in respect of the traffic interchanged at Hafod.

The same clause enacts that in the event of its being decided by the Railway Commissioners that the Taff Vale Company have failed to give proper facilities, and have not within reasonable time after notice remedied such failure, the Barry Company shall have the right to exercise running powers over certain portions of the Taff Vale system. During the exercise of these powers the obligations of the Taff Vale Company with respect to interchange of traffic at Hafod are suspended.

The appellant firm have two collieries at Ferndale, on the Rhondda Fach branch of the respondents' railway. They are sued by the respondents for a balance alleged to be due upon an account for carriages of coal and other articles from or to their collieries, and exchanged at Hafod. There is no controversy between the parties except as to the amount of the rates charged. The appellants plead that the charges made by the respondents are in excess of the maximum rate sanctioned by sect. 23 of the Barry Dock and Railways Act in the terms just quoted. The respondent company do not dispute that the traffic charged for is traffic falling within the description given in sect. 23; but they maintain, in the first place, that its enactments are only imperative as between them and the Barry Railway Company, and cannot be enforced by the appellants; and, in the second place, that upon a sound construction of the statute the rate charged is not excessive. Day J., who tried the cause, decided both points in favour of the respondents; and his judgment on the first point was unanimously affirmed in the Court of Appeal by the Master of the Rolls, sitting with Lopes and Kay L.JJ. Upon the second their Lordships did not find it necessary to express any opinion.

If the provisions of sect. 23 had not been statutory, but had simply been matter of private stipulation between the two railway companies, I should have been of opinion that the decision of the Courts below upon the first of these points was right.

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The result might have been very different according to Scotch law, which in ordinary circumstances enables one who is not a party to the contract, and who gives no consideration, to enforce a condition which is made in his favour by the parties contracting: see *Finnie* v. *Glasgow and South Western Railway Company* (1). But in England, where consideration is necessary to the validity of a mutual contract, the doctrine of jus quæsitum tertio, if admitted, at least is not recognised to the same extent.

In cases where the provisions of a local and personal Act directly impose mutual obligations upon two persons or companies, such provisions may, in my opinion, be fairly considered as having this analogy to contract, that they must, as between those parties, be construed in precisely the same way as if they had been matter, not of enactment, but of private agreement. It was in that sense that in *Countess of Rothes* v. *Kirkcaldy Waterworks Commissioners* (2) I ventured to observe that "such statutory provisions as those of sect. 43 occurring in a local and personal Act, must be regarded as a contract between the parties, whether made by their mutual agreement, or forced upon them by the Legislature." For all purposes of construction, I thought that the provisions which the House had to interpret might be legitimately viewed in that light. But it did not occur to me then, nor am I now of opinion, that the analogy of contract, for it is nothing more, could, in an English case especially, be carried further.

The provisions of a Railway Act, even when they impose mutual obligations, differ from private stipulations in this essential respect, that they derive their existence and their force, not from the agreement of parties, but from the will of the Legislature. And when provisions of that kind are not limited to the interests of the parties mutually obliged, but impose upon one or other or both of them an obligation in favour of third parties, who are sufficiently designated, I am of opinion that the obligation so imposed must operate as a direct enactment of the Legislature in favour of these parties, and cannot be regarded as a mere stipulation inter alios, which they may have an interest but have no title to enforce. These observations are not meant to apply to

(1) 3 Macq. 75. (2) 7 App. Cas. at p. 707.

any case where a private contract made between two companies is scheduled to and confirmed by the Act; because, in such a case, the form of the enactment might be held to indicate that it is to operate as a contract, and not otherwise.

In this case, imbedded in a series of obligations laid upon the Taff Vale Company, there is a positive enactment to the effect that, for the carriage of such traffic as the appellants', the company shall not charge more than a certain rate. That is an express modification of the rating clauses of their Acts; and I am therefore of opinion that, so long as the Barry Company do not obtain running powers, and these obligations continue to be incumbent on the respondent company, the appellants have a good title to insist upon their traffic being carried at the rate specified in sect. 23 of the Act of 1888.

Having arrived at that conclusion, I find it necessary to consider the second point upon which the respondents rely.

The clause in question requires that for the carriage of their traffic from Ferndale to Hafod, on its way to Barry Docks, viâ the Barry line, the appellants shall pay to the respondent company a rate per mile "not greater than the lowest rate which shall for the time being be charged by the Taff Vale Railway Company for like traffic to or from the docks at Cardiff, Penarth, or Barry." From Ferndale or Hafod to Penarth the distance is about a mile longer than to the common point to which the mean length of the transit to the Cardiff Docks is calculated. Under the provisions of various Acts, passed prior to 1888, Cardiff and Penarth Docks were grouped, or, in other words, the same rate was made chargeable between these termini and other points on the Taff Railway. Notwithstanding the uniformity of the gross rate thus established, it is obvious that, if the actual distances between the Cardiff Docks and the Penarth Docks be taken into account, the mileage rate to Penarth Docks will be the lesser of the two. The respondent company maintained successfully before Day J. that, as a legal consequence of the grouping together of Cardiff and Penarth Docks, the mileage rate to Penarth must be ascertained by assuming the distance to Penarth to be the same with the distance to that which is regarded as the common terminus of the Cardiff Docks.

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The question thus raised upon the construction of sect. 23 was subsequently considered by the Court of Appeal, consisting of the Lord Chancellor, with Lindley and A. L. Smith L.JJ., in an action at the instance of the Barry Railway Company against the present respondents. Their Lordships unanimously dissented from the view which had been taken by Day J. in this case. The Lord Chancellor said: "The Legislature seems to me to have provided that you may ascertain either the rate being charged to the docks at Cardiff, or the rate being charged to the docks at Penarth, or the rate being charged to the docks at Barry. Whichever of those is the lowest mileage rate is the lowest mileage rate to the docks at Cardiff, Penarth, or Barry, within the meaning of this section; and, of course, that would be ascertained by taking the charge from any given colliery to Penarth, finding the mileage and the rate charged, and then ascertaining by a comparison of the mileage and the rate charged what was the mileage rate." I fully concur in these observations, which appear to me to contain the true interpretation of the clause before us.

At your Lordships' bar the respondent company raised another question, which is not noticed by the learned Judges who decided *Barry Railway Company* v. *Taff Vale Railway Company* (1). The company maintained that they had power to group, and had in point of fact grouped, the docks at Cardiff and Penarth, in virtue of the powers conferred upon them by sect. 29 of the Railway and Canal Traffic Act 1888 (51 & 52 Vict. c. 25). It appears to me to be open to doubt whether they have really done so, because the 3rd sub-section of the clause provides that, where any group rate is proposed, the railway company must, after giving notice in the prescribed manner, apply to the Commissioners; and, in the event of opposition, the rate is not effectual until it has been approved by the Commissioners. There is no evidence before us that these conditions have been observed.

But, assuming that a group rate has been duly fixed in terms of sect. 29, that circumstance cannot, in my opinion, aid the argument of the respondents. The clause, no doubt, declares

(1) Reported on another point, [1895] 1 Ch. 128.

that such rate may be fixed, "notwithstanding any provision in any general or special Act"; but I do not think that declaration can affect any mileage rate which is not converted into a gross rate by the grouping. The object of the clause is to enable railway companies to relieve themselves of complaints and claims, in respect of unequal mileage rating, from traders at different termini, by grouping these termini together, abolishing mileage rates, and substituting a uniform gross rate. That procedure can, in my opinion, have no practical effect upon the rate chargeable, under express statutory provisions, for the conveyance of traffic to any terminus which is not included in the group. In this case the rate chargeable by the respondent company for the carriage of the appellants' mineral traffic from Ferndale to Hafod is determined by sect. 23 of the Barry Dock and Railways Act 1888. And, in my opinion, that clause must receive the same interpretation, whether Cardiff and Penarth Docks were grouped before the passing of that Act, or have been grouped since that date, under the powers conferred by the Railway and Canal Traffic Act of 1888.

For these reasons I concur in the judgment which has been moved by the noble and learned Lord on the Woolsack.

LORD ASHBOURNE:—

My Lords, this case depends upon the construction of sect. 23 of the Barry Dock and Railways Act 1888, the terms of which I need not repeat. The respondent company contends that that section cannot be enforced by the appellants and is only binding between them and the Barry Railway Company; and, secondly, that, from the true point of view, the rate demanded cannot be regarded as excessive.

The respondents' contention on the first point presents a somewhat narrow, restricted, and illiberal view of Railway Acts. The public have a deep concern in all such legislation, and their interests require to be regarded and protected. Railway promoters and companies know that their Bills have to pass through a stringent parliamentary ordeal, and that the Committees of both Houses will scan the proposals submitted jealously in order to see that the rights and interests of the public are duly

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safeguarded. The railway companies when they ask for powers and concessions know that they must shew some public advantages, and that if they seek to ignore them Parliament will demand an account.

In this section there is a clear enactment that for traffic like that in question the company shall not charge more than a certain rate. Why should the appellants be debarred from the right of relying upon plain words contained in an Act of Parliament? It is their goods which are forwarded; it is their money which pays the rates. Why should they be excluded from the benefit of the statutory provision? It is the natural construction of the words of the section. It violates no principle of justice or fairness or convenience. It is too narrow a view to seek to dwarf the enactment into a rigid contract between the companies. The rights and protection of the public compelled the companies to come to Parliament, and then the obligations of the companies became statutory, and cannot be regarded as merely contractual.

I do not deem it necessary to add anything on the second point.

I concur in the opinion that the appeal should be allowed.

LORD MACNAGHTEN:—

My Lords, it seems that before the year 1884 the Taff Vale Railway Company had established a railway system serving the mineral districts of Merthyr Tydfil, Aberdare, and the Rhondda Valley, and bringing the collieries there into communication with docks at Cardiff and Penarth. In 1884 the Barry Dock and Railways Company were incorporated for the purpose of constructing a dock at Barry with railways to connect it with the Taff Vale system at Treforest and at Hafod, which is about two miles to the north of Treforest. The Taff Vale Company had themselves a communication with Barry by a more circuitous route by means of the Cardiff, Penarth and Barry Railway. In 1888 the Barry Company applied to Parliament for further powers. Amongst other things, they sought for running powers over the Taff Vale system northward of Treforest—an interference with the rights of the Taff Vale Company only to be

justified by considerations of public interest. The Bill promoted by the Barry Company passed into law, and became the Barry Dock and Railways Act 1888. The Act recites that "it is expedient" that running powers over the Taff Vale Railway should be conferred upon the Barry Company in certain events. Accordingly, in certain events these running powers are given. They were not to be exercised immediately or at any fixed and definite time. They were to remain in abeyance so long as the Taff Vale Company chose to observe certain terms and conditions which are to be found in sect. 23 of the Act. For the purposes of this appeal it will be sufficient to quote the opening words of the section: "23. (1.) The Taff Vale Railway Company shall punctually and regularly forward and afford all reasonable facilities for goods and mineral traffic destined for or coming from the undertaking of the company" (that is the Barry Dock and Railways Company) "from or to Treforest or any place northward thereof, at rates per mile not greater than the lowest rate which shall for the time being be charged by the Taff Vale Railway Company for the traffic to or from the docks at Cardiff, Penarth, or Barry."

The appellants, D. Davis & Sons, Limited, are proprietors or lessees of collieries in connection with the Taff Vale Railway to the north of Treforest. They have been in the habit of sending their coal to Barry by Hafod Junction and the Barry Railway. The Taff Vale Company brought this action to recover a sum alleged to be due from the appellants for the carriage of their traffic on the Taff Vale Railway. Part of the claim is disputed on the ground that the rates charged are in excess of the mileage rate authorized by sect. 23 of the Act of 1888. The respondents' reply is two-fold. They say that if sect 23 is rightly understood it will be found that their rates are not excessive. And, further, they contend that the appellants are not in a position to complain, even assuming the prescribed limit to have been exceeded. Day J. decided both points in the respondents' favour. The Court of Appeal dealt only with the second. On that point, agreeing with Day J., they dismissed the appeal.

Now, it cannot be disputed that there has been an overcharge if the rate per mile for the appellants' traffic to and from Hafod

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is to be ascertained by taking the gross rate to Penarth, and dividing it by the number of miles in the distance. But the respondents insist that that mode of calculation is wrong. They are entitled, they say, to charge, and do in fact charge, a group rate to and from Cardiff and Penarth, and, therefore, they contend that the appellants are not at liberty to select one of those places, and calculate the rate on the actual distance in miles. Why not? The respondents may be entitled to group Cardiff and Penarth for the purpose of fixing the rates to be charged between those places and any particular point of destination or departure on their line. They may even be bound, as they allege they are by statute, for some purposes to group Cardiff and Penarth. But grouping is beside the question here. The thing to be ascertained is the limit of charge from or to the appellants' collieries to or from Hafod. The limit is to be the lowest rate per mile for the time being "charged for like traffic to or from the docks at Cardiff, Penarth, or Barry"; that is, to or from the docks at Cardiff, or to or from the docks at Penarth, or to or from the dock at Barry. You have to ascertain the mileage rate to each of those different places, and take the lowest. Given the gross rate and the number of miles, the calculation is easy enough. The conditions of the problem are not altered; the task is not rendered more difficult because the dividend—the gross rate to each of the three places—is the same. It seems to me that there is no substance in the respondents' argument on the first point.

The second point, like the first, depends on the scope and language of sect. 23.

Speaking for myself, I am quite at a loss to follow the reasoning upon which it has been held that the appellants are not at liberty to defend themselves under the provisions of that enactment. At first sight one would suppose that those whose goods are forwarded under statutory provisions must have the right to rely on those provisions so far as they make in their favour. They are the persons liable to pay. It seems only reasonable that they should be heard when they complain that they are charged too much. The construction for which the appellants contend does no violence to the language of the section. It

leads to no injustice. It creates no inconvenience. The charge is a simple matter of arithmetic. The persons to be charged are ascertained when the goods in respect of which the charge is made are delivered to the railway company. There can be nothing unfair in holding a railway company to terms which they themselves offered, or to which they professed to be willing to submit, as the price of escape from conditions more onerous or more unpalatable.

It was contended on behalf of the respondents that the only duty or obligation imposed by the section was a duty or obligation as between the two railway companies. The public, it was said, were not concerned in the matter at all. Nobody thought of them. Their interests were not regarded either by the promoters of the Bill or by Parliament. My Lords, I rather protest against that view of railway legislation. Ever since it has become the practice for promoters of undertakings of a public nature to apply to Parliament for exceptional powers and privileges, the Acts of Parliament by which those powers and privileges are granted have been regarded as parliamentary contracts, as bargains between the promoters on the one hand and Parliament on the other—Parliament acting on behalf of the public as well as on behalf of the persons specially affected. Those powers and privileges are only conceded on the footing that the concession is for the benefit of the public who are likely to use the railway as well as for the benefit of the promoters. As a general proposition this was not disputed by the learned counsel for the respondents; but they pointed out that the obligation in sect. 23 to forward goods at certain rates was an obligation imposed, not on the Barry Company who promoted the Bill, but on the Taff Vale Company who opposed it. Can that make any difference? The clause was accepted by Parliament. In accepting a particular clause in a Railway Bill the governing consideration with Parliament must be the same whether the proposal comes from one side of the table or from the other—from the promoters of the Bill or its opponents. In the present case there can be no room for doubt. The Act declares that it is expedient—expedient, that is, in the interests of the public—that running powers over the Taff Vale Railway

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system should be conferred on the Barry Company in certain events. For the present those running powers are held in suspense. Why? Because an alternative arrangement was proposed by the Taff Vale Company, and accepted provisionally by Parliament. Is it not reasonable to suppose that in considering the propriety of accepting the alternative Parliament kept in view the interests of the public, and that the alternative arrangement was accepted because the Legislature considered that the interests of the public would not suffer by the alteration?

It was urged that sect. 23 was to be treated as a contract between the two companies, and thence it was argued that no one could enforce the obligation imposed by it but the parties to the arrangement. No doubt, it is perfectly true that, as a general rule, no one can enforce a contract who is not a party to it. A third person, though intended to be benefited by a contract, cannot enforce it, because no consideration moves from him. But the simple answer to the argument is, that the obligations in sect. 23 are statutory and not contractual. They are not expressed in the form of a contract, nor are they founded on contract between the two companies. There is no reason why the peculiar doctrine of English law applicable to contracts should be applied to an enactment which speaks plainly and directly in the language of command. The argument, if I may say so with all deference, seems to be founded on an erroneous assumption in point of fact, and an imperfect analogy in point of law.

Then it was said that the statutory right of the Taff Vale Railway Company, as between themselves and the public, was to charge for the conveyance of traffic such tolls as they might think fit within the maximum allowed by their Acts, and it was argued that it would be a strong thing to hold that that power is interfered with or altered by a section in an Act of another railway company. But the truth is that the section in question does not interfere with the power of the Taff Vale Company to charge tolls up to the maximum allowed. There is nothing in this section inconsistent with that power. The Taff Vale Company may charge what tolls they please within the limits prescribed by their own Acts. The provision in sect. 23 only comes

to this, that when they have exercised the power, when they have fixed the charges, they are not to charge higher rates per mile for traffic destined for or coming from the undertaking of the Barry Company.

The suggestion that it really cannot matter to traders who use both lines whether they are overcharged or not by the Taff Vale Company, because the Barry Company will have to make up the loss if they want to keep their business, hardly seems to call for a serious reply.

For these reasons I am of opinion that the appeal ought to be allowed.

LORD MORRIS :—

My Lords, the respondents, the Taff Vale Railway Company, sued the appellants, colliery owners, for the carriage of goods over their railway. By the Taff Vale Railway Act the company are entitled to charge rates and levy tolls for the carriage of goods. There is no allegation that the respondents' claim is at any higher rate than that authorized by their Act, as the toll charged the appellants is within the maximum rate empowered to be charged. How, then, does the rate become altered? The appellants say by the operation of sect. 23 of the Barry Dock and Railways Act 1888.

The history of that Act, so far as material to this case, is, that the Barry Dock Company promoted a Bill in Parliament, and sought for certain running powers over the Taff Vale Railway. This was granted by the House of Commons; but in the House of Lords, in substitution and as matter of agreement between the two railway companies, sect. 23 was inserted as follows: [His Lordship read the first part of sect. 23.]

On the construction of this section a question arises which disposes of the case in the view I entertain. In my opinion, the section is only a legislative sanction given to the agreement entered into between the two companies, and neither the appellants nor any other person has any right conferred upon them thereby. The object of the section was to benefit the Barry Dock Company by the substitution of sect. 23 for running powers. No third party had any interest in the granting of

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running powers to the Barry Dock Company, who might or might not have sought for them, as it suited their interests.

It is now sought on the part of the appellants practically to repeal the Act settling the rate and tolls which the respondents were entitled to claim. There is no such express enactment in sect. 23. The portion of the section relied on by the appellants is part of a sentence, the whole sentence referring to the "forwarding and affording facilities" by the respondent company to the Barry Dock Company, one incident of which is the rate per mile relied upon by the appellants. Facilities for exchanging traffic appears to be the object as enacted, and the marginal note, whatever value may be attached to it, bears out this view. There is no right or privilege conferred on traders over the respondents' line, nor is any duty imposed on the respondents in relation to the public or to any third party. In my opinion there never was any such intention, nor in my opinion can the section be read as if it simply and expressly enacted that the rates for carrying traffic from Treforest or any other place north of it should be at rates per mile not greater than the lowest rate charged by the respondents from the points named. If such were exacted, it would be the enactment of a new rate of tolls within certain limits, and would necessarily be a repeal to that extent of the old rates. But I find no such express and simple enactment, and it would be strange if it could be found. Here is an Act promoted by the Barry Dock Company for their own objects and interests. It would be a curious place to find an enactment regulating the tolls of another railway company as between that railway company and the general public, when sect. 23 is merely an alternative for the running powers sought for by the Barry Dock Company.

The obligation of the Taff Vale Company is no doubt statutory; but that only leads to the question, What does the statute say? In my opinion it only says that, as between the Barry Dock Company and the respondents, the respondents shall not charge rates per mile greater than the lowest rate charged by the respondents between the points referred to. It is said this enactment of sect. 23 is not a matter solely between the two companies. I am unable to concur in that proposition; it just

is, for they are the parties contracting, and whose contract is made statutory. I am also unable to follow the supposed principles on which Parliament grants powers to railway companies. Whatever they are, I presume they are to be collected from the statute itself, and that if the interest, or alleged interest, of the public is intended to be safeguarded in any special way, such safeguarding must be found in the statute. If there was any intention to safeguard colliery traders, or any trader, and give them benefits of lowering of rates, why does the statute not say so? I decline to torture a facility as between two companies wrapped up with other facilities into an enactment altering the rights previously existing by statute as between one of the companies and the general public.

With all respect for your Lordships' opinion to the contrary, I am clearly of opinion that the judgment of Day J. on the question is right, and that the judgment of the Court of Appeal affirming it should stand.

Order of the Court of Appeal and judgment of Day J. reversed with costs here and below: Directed, that the amount due from the appellants to the respondents in respect of rates and charges for the carriage and conveyance of goods and mineral traffic between the appellants' collieries and the junctions with the Barry Railway Company at Hafod and Treforest, between the 31*st of May* 1890 *and the* 30*th of June* 1891, *be properly ascertained in the Queen's Bench Division: Cause remitted to the Queen's Bench Division.*

Lords' Journals 10th May 1895.

Solicitors for appellants: *Downing, Holman & Co. for Downing & Handcock, Cardiff.*

Solicitors for respondents: *Ince, Colt & Ince for Ingledew & Sons, Cardiff.*

[HOUSE OF LORDS.]

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THE CHAMBER COLLIERY COMPANY, LIMITED . . . . . } APPELLANTS;

AND

THE COMPANY OF PROPRIETORS OF THE ROCHDALE CANAL . . . . } RESPONDENTS.

Canal Company—Right to support for Canal—Mines under or near Canal—Compensation for not working Mine—Apprehended danger to Canal from working of Mine—Right of Action for Injury to Canal—Undertaking by Canal Company not to sue.

A special Act, empowering a company to make a canal, by sect. 39 reserved to the owners of lands in, upon, or through which the canal was to be made the mines and minerals within or under the lands to be set out or made use of for the canal, and authorized the owners to work such mines and minerals, not thereby injuring the canal. Sect. 40 provided that if the owner of any mines should in working such mines work near to or under the canal, so as in the opinion of the canal company to endanger or damage the canal, or in the opinion of the owner of the mines to endanger or damage the further working of the mines, it should be lawful for the company to treat and agree with the owner for all such minerals as might be near or under the canal as should be thought proper to be left for the security or preservation of the canal; and in case they should disagree, a jury might, at the request of the company or of the owner, be summoned to assess what satisfaction such owner ought to receive from the company on being restrained from working such mines:—

Held, that an owner of mines adjacent to but not under the canal did not come within sect. 39 and was under no statutory liability towards the canal company in working his mines: consequently that if the working of such mines near the canal would not endanger or damage the further working of the mines, although it would cause some damage to the canal, the owner could not under sect. 40 insist against the will of the company upon minerals being left for the security and preservation of the canal and upon receiving satisfaction from the company therefor, the company being willing that the owner should work as he pleased, and preferring from time to time to bear the expense of the necessary repairs to the canal rather than compensate the owner for his unworked minerals.

The decision of the Court of Appeal ([1894] 2 Q. B. 632), that the appellants were not entitled to proceed under sect. 40, affirmed upon the

above ground, the appellants' mines being adjacent to but not under the canal.

Quære, as to the propriety of the terms imposed by the Court of Appeal.

Knowles v. *Lancashire and Yorkshire Railway Company* (14 App. Cas. 248) and *Cromford Canal Company* v. *Cutts* (5 Rail. Cas. 442) distinguished.

THE following statement of facts is taken from the judgment of Lord Herschell:—

The Rochdale Canal was made under the powers conferred by the Rochdale Canal Act, 1794 (34 Geo. 3, c. lxxviii.). Sect. 39 of that Act was as follows: "39. Provided always, and be it further enacted, that nothing herein contained shall extend to defeat, prejudice, or affect, the right of the lord or lords, or lady or ladies of any manor or manors, or the owner of any lands, in, upon, or through which the said canal, cuts, and reservoirs, or any of them, or any towing-paths, wharfs, quays, trenches, sluices, passages, watercourses, or conveniences aforesaid, shall be made, to the mines and minerals lying and being within or under the lands to be set out or made use of as aforesaid, but all such mines and minerals are hereby reserved to the lord or lords, lady or ladies, of such manor or manors, and the owner of such lands respectively; and it shall be lawful for the lord or lords, lady or ladies of such manor or manors, and the owner of such lands respectively (subject to the conditions and restrictions herein contained), to work, get, drain, take, and carry away, to his or her own use, such mines and minerals, not thereby injuring, prejudicing, or obstructing, the said canal, cuts, and reservoirs, towing-paths, wharfs, quays, trenches, sluices, watercourses, or other the conveniences aforesaid, or any of them."

Sect 40 was as follows: "Provided also, that if the owner or worker, or owners or workers, of any coal or other mine or mines, shall, in pursuing or working such mine, work near to or under the said canal, cuts, and reservoirs, or any of them, so as in the opinion of the said company of proprietors to endanger or damage the same, or in the opinion of the owner or worker, owners or workers, of the said mine or mines, to endanger or damage the further working thereof, then it shall be lawful for the said company of proprietors to treat and agree with such

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owner or worker, or owners or workers, for all such coals or other minerals as may be near or under the said canal, cuts, and reservoirs, or any of them, as shall be thought proper to be left for the security or preservation of the said canal, cuts, and reservoirs, or any of them; and in case the said company of proprietors, and such owner or worker, or owners or workers, of such mine or mines, shall disagree touching the satisfaction to be made for such coal or other minerals, then it shall be lawful for the said Commissioners, at the request of the said company of proprietors, or of such owner or worker, owners or workers, of such mine or mines, to cause a jury to be summoned and impannelled in the manner herein directed, who shall, and they are hereby authorized and required, by such ways and means as aforesaid, to assess and determine what satisfaction such owner or worker, owners or workers, of such mine or mines, ought to have and receive from the said company of proprietors, on being restrained from working such mine or mines, and upon payment or satisfaction made to such owner or worker, owners or workers, of such mine or mines, by the said company of proprietors, according to the verdict or judgment of such jury, such owner or worker, owners or workers, of such mine or mines shall be, and he, she, or they, is or are hereby perpetually restrained from working such mine or mines within the limits for which satisfaction shall be by the said jury adjudged and declared to extend."

The appellants are owners of mines lying under land adjacent to the Rochdale Canal, of which the respondents are the proprietors. The appellants claim also to be the owners of minerals lying under a portion of the canal.

In December 1890 the appellants gave the respondents notice that they were in a position to work and get the mines and minerals shewn on an annexed plan, and in pursuance of working such mines and minerals would work near the canal, and that they were of opinion that the further working and pursuing such mines would endanger and damage the canal within the meaning of the statute, and, further, that they were ready and willing to treat and agree with the company for all such coal and minerals near or under the canal as should be proper to be left for the security and preservation thereof, and that in case

they and the proprietors of the canal should fail to agree as to the amount of satisfaction payable for the said coals and minerals, then the colliery company would require the proprietors of the canal to take all such steps as might be necessary and proper for the purpose of having such satisfaction ascertained. The respondents declined to treat for the coal, or to take any steps for the purpose of having the compensation payable to the appellants in respect of the coal being left unworked ascertained. The appellants thereupon brought this action, claiming to have it declared that the appellants were entitled to have ascertained what portions of the mine specified in their notice ought, having regard to the 39th and 40th sections of the Act of 1794, to be left by them, and what compensation was payable to them in respect of the said portions of the mine. They further claimed that the portions of the mine so to be left, and the amount of compensation so payable, might be ascertained and declared, and that the defendants might be ordered to pay to the appellants the amount of such compensation when ascertained. The action was referred to Mr. Gully Q.C., as arbitrator, who found that there was no reasonable ground for apprehending that the working of the mines near or under the canal would cause damage to the mines, or to the further working thereof by the percolation of water from the canal to the mines, but that the effect of working the mines within the pillars set out by him in broken red lines on a plan annexed to the award would be to cause a subsidence of the canal between the parts marked thereon A and C. He further found that such subsidence would not interfere with the navigation of the canal, but would necessitate repairs from time to time during a period of from eight to ten years to the towing-path and banks of the canal, and probably to the bridges at A and B on the plan, and that the cost of such repairs would be substantial, but would not be likely to exceed in the whole £1000 or £1200. He was of opinion that the appellants on leaving unworked the pillars set out in broken red lines upon the plan were entitled to be paid compensation by the defendants for the adjacent support so afforded, and assessed such compensation at £12,688. Both parties appealed to the Queen's Bench Division against the

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award of the arbitrator, the appellants insisting that they were entitled to a further sum as compensation in respect of the coal under the canal, which the arbitrator had, erroneously as they alleged, found not to be their property, the respondents maintaining that they were not liable to pay any of the compensation assessed, or that it ought, at all events, to be reduced by a sum of £1150 mentioned in the award. The Divisional Court (Cave and Wills JJ.) were of opinion that the appellants were the owners of the coal under the canal which they claimed as theirs, and also that they were entitled to the compensation assessed by the arbitrator, subject to a deduction of the sum of £1150. The Court of Appeal (Lord Esher M.R., Kay and A. L. Smith L.JJ.) (1), on the respondents undertaking by their counsel that they would not object to the working of the coal under or near the canal between the points marked A and C on the plan referred to in the award, and that they would at their own expense repair any damage that might be done to the canal or banks or towing-path by reason of such working, and that they would not make any claim on the colliery company in respect of such damage, ordered that the appeal should be allowed, and that the order of the Queen's Bench Division should be discharged, and the award of the arbitrator set aside.

Against that decision the plaintiffs brought the present appeal.

May 3, 6, 14; June 18, 24. Sir *R. E. Webster* Q.C. and *Leigh Clare* (*J. A. Tweedale* with them) for the appellants:—

The offer of the respondents is insufficient for the protection of the appellants, who may be liable to adjoining owners. The undertaking only amounts to a covenant, which the appellants are not bound to accept in place of what the statute gives them. Moreover, ambiguity might arise out of the undertaking. The area of unworked coal necessary to save the mines might not be the same as that which is required to support the canal. If the respondents failed to repair, the burden might fall upon the appellants. The canal company might become insolvent or abandon their undertaking, which in view of the amount of prospective damage might become unremunerative. The appellants

(1) [1894] 2 Q. B. 632.

cannot be made to accept in lieu of their statutory rights an undertaking subject to so many contingencies, and the Court of Appeal had no jurisdiction to impose such terms. The canal company have no power to bind their successors, and the undertaking is ultra vires. The statute prescribes the course to be adopted, and if the statute applies that course is the only one which can be taken. In *Ayr Harbour Trustees* v. *Oswald* (1) Lord Blackburn held that the appellants in that case had no power by agreement to bind their successors. The *Staffordshire and Worcestershire Canal* v. *Birmingham Canal* (2) also shews that the statutory conditions must be observed, and that no rights outside the conditions can arise by grant or prescription. The same principle was enforced in *Mulliner* v. *Midland Railway Company* (3) and in *Rochdale Canal Company* v. *Radcliffe* (4), where Lord Campbell C.J. points out that the canal was made for the public benefit. See also *Benfieldside Local Board* v. *Consett Iron Company* (5). A public nuisance might arise of which any person affected would be entitled to complain: *Spencer* v. *London and Birmingham Railway Company* (6). *Cromford Canal Company* v. *Cutts* (7) shews that the appellants are entitled to insist on the arbitration and award. The case is governed by *Knowles* v. *Lancashire and Yorkshire Railway Company* (8), where the provisions of the Act of Parliament were virtually the same as they are here. In that case it was held both in the Court of Appeal and this House that any working of the mines which would endanger the canal was unlawful. That case is an authority that though the mines may not suffer yet if the canal and towing-path will (as is found to be the case here), so much of the minerals must be left as is necessary for the support of of the canal and towing-path, and for this the appellants are entitled under the Act to receive compensation.

Sir *H. James* Q.C. and *Joseph Walton* Q.C. (*McSwinney* with them) for the respondents:—

The appellants have no mines under the canal, and there is

(1) 8 App. Cas. 623, 634.
(2) L. R. 1 H. L. 254.
(3) 11 Ch. D. 611.
(4) 18 Q. B. 287, 312.
(5) 3 Ex. D. 54.
(6) 8 Sim. 193.
(7) 5 Rail. Cas. 442.
(8) 14 App. Cas. 248.

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no statutory restriction to prevent the appellants from working the coal. Sect. 39 only applies to mines under the canal, not to mines near it. Sect. 40 applies to mines near as well as mines under the canal, but it does not enable mine-owners to put the machinery in motion for any other cause than danger to the mines. The canal-owners might have moved under sect. 40 if they had apprehended danger to the canal, but they have not done so: the mine-owners can go on working. The appellants say there is danger to their mines, but the arbitrator has found against them. Thus a case for the appellants to insist on purchase has not arisen. *Knowles' Case* (1) does not help the appellants, that decision being based on the statutory liability of the owners of minerals under the canal, who were forbidden to work so as to injure the canal. The appellants not being subjacent owners are not entitled in any way to the benefit of sect. 39, and that section does not prohibit them from working the mines so as to injure the canal. As adjacent owners the appellants are under a common law liability to support the canal site. As to the mines under the canal the arbitrator found that the vendor had no intention to reserve them to himself, and in the absence of expressed reservation, they passed to the owners of the canal. As to what will be included in a grant, see *Dyne* v. *Nutley* (2).

Sir *R. E. Webster* Q.C. in reply:—

Knowles' Case (1) draws no distinction between subjacent and adjacent land. In both cases there is a statutory restriction on the working of the mines. As to the right of lateral support, see *Smith* v. *Thackerah* (3); *Elliot* v. *North Eastern Railway Company* (4); *London and North Western Railway Company* v. *Evans* (5). The appellants are both subjacent and adjacent owners. Even in the absence of express reservation of mines the appellants are subjacent owners to the extent of the middle of the canal: *Berridge* v. *Ward* (6); *Micklethwait* v. *Newlay Bridge Company* (7).

(1) 14 App. Cas. 248.
(2) 14 C. B. 122.
(3) L. R. 1 C. P. 564.
(4) 10 H. L. C. 333.
(5) [1893] 1 Ch. 16.
(6) 10 C. B. (N.S.) 400.
(7) 33 Ch. D. 133.

[LORD MACNAGHTEN referred to *Dwyer* v. *Rich* (1); *Doe* d. *Pring* v. *Pearsey* (2).]

The House took time for consideration.

July 24. LORD HERSCHELL (after stating the facts given above):—

My Lords, I defer dealing with the subordinate points for the present, and shall confine myself to a consideration of the main question in controversy which arises upon those parts of the award to which I have called attention.

The main question to be determined is the effect of sects. 39 and 40 of the Act of 1794. Precisely similar sections in another canal Act came under the consideration of this House in the case of *Knowles* v. *Lancashire and Yorkshire Railway Company*. (3) The appellants contend that the judgment in that case established that even although the mines under or adjacent to the canal would not suffer from the working of minerals in its neighbourhood, yet if, as was found to be the fact in the present case, the canal or towing-path would be prejudicially affected in case the minerals were worked out, so much of them must be left as was necessary for the support of the canal and towing-path, and that the appellants were entitled under the Act to receive compensation in respect of the coal which would thus remain unworked.

In the Court of Appeal the respondents do not seem to have much insisted that there was a distinction between the rights of the parties according as the coal proposed to be worked lay under or adjacent to the canal. In the argument at the Bar of your Lordships' House this distinction was made a prominent point in the respondents' argument. Admittedly the greater part of the coal which has given rise to the dispute lies adjacent to and not under the canal. Whether the appellants own any coal under the canal is a matter in controversy which I will consider hereafter. Meantime I shall address myself only to the part of the case relating to the coal between the points A and B on the plan, none of which is under the canal.

(1) Ir. Rep. 6 C. L. 144. (2) 7 B. & C. 304.
(3) 14 App. Cas. 248.

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It appears clear that sect. 39 has no application to this coal, that section being in terms confined to the subjacent minerals. As regards these, there is a clear statutory prohibition of any such working of them as will injure or prejudice the canal or towing-path, and there is therefore a statutory liability imposed if these minerals are so worked as prejudicially to affect the canal or any of the accompanying works belonging to the proprietors. As regards the working of minerals adjacent to the canal, there is no corresponding prohibition or liability. In the case of *Knowles* v. *Lancashire and Yorkshire Railway Company* (1) the plaintiffs' claim was for working coal under and near the canal and works, whereby they had been injured. The defendants, before they worked the coal forming the subjacent and adjacent support of the canal, gave the plaintiffs notice that they were going to work it, and nothing was thereupon done by the plaintiffs. The contention on behalf of the defendants was, that as the plaintiffs did not proceed, under the section corresponding to sect. 40, to have compensation for leaving the coal necessary for the support of the canal ascertained, they had no right to complain that the defendants had so worked as to injure the canal. This House affirmed the judgment pronounced in the Courts below in favour of the plaintiffs. In the argument on behalf of the defendants in this House, no distinction was drawn between subjacent and adjacent coal. It may probably have been the case that if the subjacent coal had been left, the working of the adjacent coal would have caused no subsidence. But, however that may be, the judgment of this House was rested entirely upon the express provisions of sect. 37 in the Act then under consideration, which corresponds with sect. 39 of the statute of 1794. The Lord Chancellor pointed out that the plain words of the 37th section made the mine-owner liable if he caused injury to the canal, and that no reason for cutting down the plain meaning of the words could be derived from the enactment contained in the succeeding section. Lord Macnaghten took the same view. After referring to the words of sect. 37, he says: "If these words are to have their ordinary meaning it cannot be disputed that the order under appeal is right. The

(1) 14 App. Cas. 248.

appellants, however, contend that their meaning must be cut down or qualified." After discussing their arguments he proceeded thus: "The condition on which the statute allows mines to be worked must be borne in mind. The section is framed on the supposition that the mine-owner keeps in view his statutory liability. And it is to be observed that in his case the damage and danger spoken of in the section are not damage and danger to the mine, but damage and danger 'to the further working of the mine.' It seems to me that the meaning of the section is this: The proprietors of the canal may apply to the Commissioners if they apprehend damage or danger to the canal. On the other hand, when the working of a mine has reached a point at which the mine-owner finds that, having regard to the proximity of the canal and his statutory liability, he cannot work further without some danger, or cannot work further to the same advantage as he could if the canal were not there; then it is open to him to initiate proceedings, and he is entitled to receive satisfaction for such minerals as shall be thought proper to be left for the security of the canal or the mine."

It is to be observed that in the opinion of the noble and learned Lord, sects. 37 and 38 (in this Act 39 and 40) were to be read together, and that his judgment as to the liability of the mine-owner, and the right which he has to insist that the amount of compensation payable to him for the coal necessary for the support of the canal should be ascertained, is based on the statutory liability created by the earlier section. In a case, therefore, like the present, in which sect. 39 is inapplicable, and where there is no statutory liability in relation to the working of the coal, the entire reasoning of this House in the case of *Knowles* v. *Lancashire and Yorkshire Railway Company* (1) is equally inapplicable.

What I have said with reference to *Knowles' Case* (1) applies also to the case before Lord Cottenham (2). If your Lordships were now considering the question of subjacent coal, it might be a serious question whether the right which the appellants would have, according to the authority I have been discussing, to take

(1) 14 App. Cas. 248.

(2) *Cromford Canal Company* v. *Cutts*, 5 Rail. Cas. 442.

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proceedings for the purpose of obtaining an assessment of the compensation, could be abrogated by a waiver on the part of the canal proprietors of the statutory prohibition contained in the 39th section, and of the liability thereby imposed, and whether there was any legal power on their part, by undertaking or otherwise, to give effectual authority to the colliery proprietor to work his mines in a manner prohibited by the statute and discharged from the liability which it imposes. In the present case, however, where your Lordships are dealing with the case of adjacent minerals, the 40th section is the only one which has to be considered. That section is not limited, like the 39th, to the subjacent minerals. It deals also with those adjacent. In the case of the latter, however, there is, as I have pointed out, no statutory prohibition of their being so worked as to affect the canal prejudicially.

What, then, are the rights of the parties, the canal proprietors on the one side and the colliery owners on the other, under the 40th section? That section is somewhat clumsily drawn; but I think its meaning is tolerably plain. Either the canal proprietors or the mine-owners can initiate proceedings under that section if, in the opinion of the former, the working of the mine is likely to endanger the canal, or if, in the opinion of the mine-owner, it is likely to endanger or damage the further working of his mine. If such proceedings are initiated, and the parties are unable to agree, a jury is to determine the extent to which the working of the mines must be perpetually restrained for the security or preservation of the canal. In the case before your Lordships the canal proprietors have not invoked the operation of sect. 40. They are content to allow the appellants to work their adjacent minerals as they please. The appellants, on the other hand, claim the right to insist on receiving satisfaction, and being restrained from working some portion of their mines. The arbitrator found, as it must now be taken correctly, that there was no reasonable ground for apprehending any damage to the mines from working within the area in controversy. Indeed, in the notice of December, 1890, to which I have already referred, the colliery company only stated that they were of opinion that the further working and pursuing of such mines

would endanger and damage the canal within the meaning of the Act of Parliament. They did not allege that it would endanger or damage the further working of the mines. It is difficult, therefore, to see how they bring themselves within the 40th section. I should be unwilling to lay much stress on this if I were satisfied that the facts of the case would bring them within it; but I am unable to see that this is so. The further working of their mines is not endangered even in the broad sense which Lord Macnaghten gave to those words, inasmuch as they would be under no statutory liability if, owing to their working of the mines, the canal was affected. What right have they, then, under sect. 40, to institute proceedings, and to insist that the canal proprietors shall, against their will, purchase sufficient coal to afford to their canal complete immunity from damage, when they are of opinion that it will be much more to their interest to suffer the comparatively trifling damage which seems probable, and which will not interfere with the navigation of the canal, than to bear the enormous cost of buying the coal required for rendering the canal secure from disturbance? It seems to me that the facts found by the arbitrator deprive the appellants of any locus standi under the 40th section. So far, then, as regards the adjacent coal between the points A and B, I think the appellants' case fails, and that the order of the Court of Appeal, if it erred at all, was unduly favourable to them.

If the appellants could establish that they were the owners of the coal under the canal between the points marked B and C on the plan, they would bring themselves within the case of *Knowles* v. *Lancashire and Yorkshire Railway Company* (1), and an entirely different question would arise.

I proceed, therefore, to inquire whether the Queen's Bench Division rightly decided that the appellants had made out their title to this coal. In the view which the Court of Appeal took, it was unnecessary for them to express any opinion upon this point. It depends upon the construction of a conveyance of the 1st of October 1866. The subject of the grant is thus described: "All and singular the messuages, lands, and hereditaments situate in the township of Chadderton respectively comprised in

(1) 14 App. Cas. 248.

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the schedule hereunder written." It seems abundantly clear, therefore, that nothing passed which was not comprised in that schedule. The schedule has three columns, the first headed "Number on plan," the second "Names of fields," the third, "Quantity." It contains a description of a number of meadows, gardens, &c., all of them (except two small pieces of nursery-ground said to be in hand), being described as in the occupation of persons named. The acreage of each hereditament is given, the total acreage being stated as 188A. 2R. 5P. The following words are then added: "Together with all mines and minerals under the said lands, or any part or parts thereof. All which lands intended to be comprised in this schedule are delineated in the map or plan drawn on the last skin of the above written indenture, and which is copied from the tithe apportionment plan, and are therein coloured yellow, and numbered with the numbers respectively corresponding with the numbers in the first column of this schedule, and in the book of reference to the said tithe apportionment plan." It appears clear that no mines are conveyed except such as are under lands conveyed. The only description of the mines and minerals is that they are "under the said lands or any part or parts thereof." Where the surface is conveyed the mines are conveyed, not otherwise. There is, of course, no pretence for saying that any part of the canal was conveyed or intended to be conveyed. But then it is said that the lands intended to be comprised in the schedule are described as delineated on the plan and therein coloured yellow, and it is true that the yellow tinting extends over the entire plot, including the portion of the canal running through it. The description, however, does not stop there; it continues: "and numbered with numbers respectively corresponding with the numbers in the first column of this schedule." It is clear that the canal does not come within this category; and this being so, I can see no justification for saying that it is comprised in the schedule.

The learned counsel asked whether, if the coal under the canal did not pass, the coal under a highway running through the land, and which was equally undescribed and unnumbered, remained in the grantor. The cases do not seem to me to be

identical. If the soil in the highway was in the owner of the closes on either side of it, it might well pass by a conveyance of those closes without specific description. The arbitrator has found that the land occupied by the canal passed to, and is the property of, the respondents.

Wills J. felt great difficulty in saying that the coal under the canal passed by the terms of the conveyance; but he thought it never could have been intended by the vendors to reserve it, that the deed would be at once rectified on the application of the grantees, and that the coal must therefore be regarded in equity as their property. I cannot adopt this view. I think it may very probably have been omitted from the conveyance by an oversight. Again, it is not improbable that the parties never thought about it, and that there was no intention either to convey or to reserve it. But with nothing before the Court except the conveyance, with no evidence of the circumstances of the transaction, and not even the agreement which led up to the conveyance, I think it is impossible to found on a mere speculation as to the intention of the parties a declaration that the appellants are in equity entitled to this coal. To set such a precedent might lead in many cases to grave injustice.

For these reasons, I think the appellants have not made out their title to any coal under the canal.

In view of the conclusions at which I have arrived, it is unnecessary to say anything with reference to the other questions discussed in the arguments at the Bar.

I think the judgment appealed from must be affirmed, and the appeal dismissed, with costs.

LORD WATSON:—

My Lords, the most important question raised in this appeal relates to the construction of sects. 39 and 40 of the special Act 34 Geo. 3, c. lxxviii., by which the respondents were incorporated and their undertaking authorized. The Act did not require that the respondents should, for the purpose of constructing the canal with its accessory works, purchase any interest in the subjacent or adjacent mineral strata; and these two clauses were introduced in order to give mutual protection to the

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respondents, and to the owners of these strata, in the event of their mineral workings being carried so far as to threaten either danger to the canal or injury to the mines. The clauses are in the form which appears to have been in common use in statutes authorizing similar undertakings towards the end of last century. They are, for all practical purposes, identical with sects. 34 and 35 of 29 Geo. 3, c. lxxiv., which were considered by Lord Cottenham in *Cromford Canal Company* v. *Cutts* (1), and also with sects. 37 and 38 of 31 Geo. 3, c. lxviii., which were before this House in *Knowles* v. *Lancashire and Yorkshire Railway Company* (2). [His Lordship then stated the facts.]

My Lords, it appears to me, and it was practically conceded by their counsel, that the appellants cannot prevail unless they succeed in shewing that they are in a position to claim the remedies provided by sect. 40 of the respondents' special Act. If they are entitled to these remedies, then, in my opinion, the judgment of the Appeal Court has given them considerably less than their statutory rights. In order to ascertain whether they are or are not possessed of these rights it is necessary to consider and determine these two points: (1.) whether the appellants are the owners of the minerals below the canal between the points B and C; and (2.) if they are not, whether the provisions of the special Act confer upon a proprietor of mineral seams adjacent to the canal any and, if so, what right to use the remedies specified in sect. 40.

I find nothing in the opinions expressed by the learned judges of the Appeal Court to indicate their dissatisfaction with the finding of the Divisional Court that the minerals below the canal between B and C belong to the appellants. And it appears to have been assumed by the referee, as well as by the Divisional and Appeal Courts, that, in so far as the remedies thereby provided are concerned, the statute makes no distinction between proprietors of subjacent and proprietors of adjacent minerals.

The alleged right of the appellants to the minerals below the canal between B and C depends upon the terms of a conveyance of the land on the north of the canal, dated the 1st day of

(1) 5 Rail. Cas. 442. (2) 14 App. Cas. 248.

October 1866, to three persons of the name of Lees, whose interests the appellants have acquired. The lands conveyed were part of the Chadderton estate, and it is an undoubted fact that at the date of the conveyance the minerals below the canal between B and C were the property of the vendor. But I do not think that the conveyance gives the appellants any title to the minerals underlying the canal. Its language is strictly limited to the lands sold, which now belong to the appellants, and to the minerals immediately below them. The appellants were accordingly driven to maintain that they have an equitable title to these subjacent minerals, derived from the obvious intention of the vendor that they should pass to the purchasers along with the subjects expressly conveyed. I agree with your Lordships in thinking that the argument rests upon the merest speculation, and that there is no reliable evidence of any such intention.

The question, therefore, comes to be whether the appellants, as the owners of mines adjacent to, but not underlying the canal, have a good title to insist in the conclusions of the present action.

It was argued for the appellants that the construction of these statutory clauses, in their application to the case of an adjacent mine-owner, has been definitely settled by the decision in *Cromford Canal Company* v. *Cutts* (1), which was followed in *Knowles* v. *Lancashire and Yorkshire Railway Company* (2). I was at one time very much disposed to accept the argument; but a closer examination of those two cases has led me to reject it. Both cases appear to me to establish the principle that a mine-owner, who is expressly debarred from working his minerals to the injury, prejudice, or obstruction of the canal and its cuts, reservoirs, towing-paths, and other works and conveniences, can have his remedy under the second of these sections if the continuance of his working will be attended with such injury, prejudice, or obstruction, although he cannot establish that it will occasion any detriment to his mine. The noble and learned Lords who affirmed that principle did so upon the ground that the statute had cast upon the mine-owner a positive obligation not to work

(1) 5 Rail. Cas. 442. (2) 14 App. Cas. 248.

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so as to injure the canal or any of the works connected with it—an obligation which, in my opinion, could neither be waived by the owners of the canal nor dispensed with by a court of justice. The facts presented to the Court were that the mine-owner was proprietor of the minerals subjacent as well as adjacent to the canal, and had worked out both. In these circumstances, I think that the observations of the noble and learned Lords when fairly construed must be taken to refer to such workings as were in violation of the mine-owners' statutory obligation to give support. One inference is, in my opinion, derivable from their observations —namely, that a mine-owner who is under no statutory obligation to give support, and whose mine is not in danger, cannot pursue the remedy afforded by the provisions of the second section.

The prohibition against mine-owners working so as to injure, prejudice, or obstruct the canal and its works is contained in the first of the clauses under consideration. Sect. 39 commences with the declaration that nothing in the Act contained shall defeat, prejudice, or affect the right of mine-owners "to the mines and minerals lying and being within or under" the lands to be used by the respondents for the purposes of their undertaking, and that all such mines and minerals are reserved to them. It then proceeds to enact "that it shall be lawful" for such mine-owners "(subject to the conditions and restrictions herein contained) to work, get, drain, take and carry away to his or her own use, such mines and minerals, not thereby injuring, prejudicing, or obstructing the said canal, cuts, &c." The mines and minerals thus referred to, to which alone the prohibition against working to the injury, prejudice, or obstruction of the canal attaches, are the mines and minerals "lying and being within or under" the lands to be set out and used by the canal company for the purposes of the Act. It is clear that the statutory prohibition does not apply to mines and minerals which are adjacent to the canal or its works.

I am, therefore, of opinion that the respondents' counsel were right in their contention that the Act leaves the appellants at liberty to work their adjacent minerals, even though their workings may result in injury to the canal or its works. I do not

doubt that it would be within the power of the respondents, if so advised, to stop their workings, upon their shewing that these workings would be injurious to their undertaking, and upon their making due compensation, as provided by sect. 40. I am also of opinion that the appellants would have been entitled to take proceedings under that section could they have shewn that the effect of working up to the edge of the canal would be to let the water of the canal into their mines. But, having failed to establish that fact, and being under no obligation to give support to the canal, they are not, in my opinion, entitled to maintain the present action.

For these reasons, I have come to the conclusion that the judgment of the Court of Appeal must be affirmed.

LORD MACNAGHTEN:—

My Lords, the canal, of which the respondents are the proprietors, was constructed under the powers of an Act of Parliament passed in the year 1794 (34 Geo. 3, c. lxxviii.). Sects. 39 and 40 of that Act, on which the question before your Lordships mainly depends, are almost identical in language, and absolutely identical in scope and effect, with sects. 37 and 38 of the Act of 31 Geo. 3, c. lxviii., which came under the consideration of this House in the case of *Knowles* v. *Lancashire and Yorkshire Railway Company* (1).

The appellants are the owners and workers of coal mines in the district through which the canal runs. In 1890, in the course of their underground working, they were approaching the canal. Being apprehensive about the consequences of working too near it, they gave the respondents notice in December of that year that they were willing to treat and agree with them for all such coal as should be proper to be left for the security or preservation of the canal according to the true intent and meaning of the Act of 1794.

Some correspondence followed, which led to no result. Then in March 1891 the appellants brought the action out of which this appeal arises. They claimed a declaration that they were entitled to have it ascertained what portions of the mines

(1) 14 App. Cas. 248.

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specified in the notice of December 1890 ought, having regard to sects. 39 and 40 of the Act of 1794, to be left by them, and what compensation was payable to them in respect thereof, and they asked for consequential relief.

The questions involved in the action were referred to Mr. Gully, who was to have all the powers of a judge of the High Court.

Mr. Gully made his award on the 19th of January 1894. In substance he found that the further working of the mine would not injure the mine. He found that it would not injure the canal so far as regards the navigation; but that it might have the effect of rendering necessary certain repairs from time to time during the next few years, and that such repairs would probably cost in all about £1000 or £1200. He also found that, in order to prevent the possibility of the damage which would render those repairs necessary, a large amount of coal, within an area which he marked out on a plan accompanying his award, must be left unworked. He estimated the value of such coal at £12,688. In the result he awarded that sum to the appellants, and ordered that they should be perpetually restrained from working the coal within the prescribed area.

There was an appeal to the Divisional Court, who substantially confirmed Mr. Gully's award, though in some respects they thought it ought to be varied in the appellants' favour.

The Court of Appeal, however, took a different view. Finding that the respondents were willing to deposit in court a sum sufficient to cover the estimated cost of the repairs, and to undertake not to bring any action against the appellants in respect of any damage that might be occasioned by further working within the prescribed area, and also finding that an offer to that effect had been made in the course of the litigation, their Lordships discharged the order of the High Court, and set aside Mr. Gully's award. At the same time their Lordships directed an inquiry as to the damage occasioned to the appellants by the temporary suspension of their workings between the date of their notice of December 1890 and the date of the offer, which, in their Lordships' opinion, ought not to have been refused by the appellants.

My Lords, if I were bound to accept the premises on which the Court of Appeal proceeded, I should, I think, have some difficulty in assenting to the conclusion at which they arrived. When the case was before the Court of Appeal, it was taken for granted that getting minerals to the injury or prejudice of the canal was equally forbidden by the Act of 1794 whether the mines were subjacent or adjacent. At any rate, the attention of the Court does not appear to have been called to any distinction between the two cases. The learned Master of the Rolls begins his judgment by describing the appellants as "owners of mines near and under the canal"; and there are other passages in the judgments delivered in the Court of Appeal to the same effect. As regards the damages which the arbitrator apprehended as the result of further working, their Lordships did not consider them imaginary or unsubstantial. But, comparing the estimated value of the coal which the appellants were to be restrained from working with the estimated cost of the probable repairs, they seem to have thought it unreasonable to enforce the provisions of the Act and to give the appellants the complete indemnity to which otherwise they would have been held entitled. There was, I think, great force in the argument on the part of the appellants that the Court had no power to dispense with the restrictions and provisions of the Act of Parliament, and that, if the working which the respondents proposed to sanction was really unlawful, it was not competent for them to bind themselves or their successors to permit it, and that at any rate no permission or sanction on the part of the canal company could relieve the appellants from claims by third persons who might be injured in consequence of the appellants working in contravention of the Act of Parliament. These points, as it seems to me, would have been worthy of consideration if the appellants had been met upon the ground on which they were prepared to take their stand. But the learned counsel for the respondents at the bar took up a position which was not maintained, or apparently even suggested, in the Court of Appeal. They said that, having regard to the findings of the arbitrator and the position of the appellants' property, there was nothing in the Act of Parliament

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to prevent them from working out the whole of the coal which belonged to them. The further working which the award restrained would not injure the mine, nor would it injure the canal by any operation prohibited by the Act of Parliament.

My Lords, if this argument is well-founded, I must say I see no answer to it. Whether it is or is not well-founded depends partly on a question of fact and partly on the true construction of the Act of 1794.

As regards the position of the appellants' property in reference to the canal, I am of opinion that they have no title, legal or equitable, to any mines or minerals lying and being within or under the lands set out or made use of for the canal. This is so admittedly, except as regards a portion of the Chadderton property, which was conveyed to their predecessors in title in 1866. The conveyance of 1866 passes land on both sides of the canal. But there is nothing in the deed to carry the mines under the canal. It was argued that the particulars of sale included the minerals under the canal, and that the purchaser intended to buy, and that the vendor intended to sell, those minerals. That may have been the intention of the parties. But there is nothing in the particulars of sale or any other document which compels one to come to that conclusion. The inference which the appellants desire your Lordships to draw is merely a matter of guess. Then it was argued that the conveyance of the two separate plots intersected by the canal would carry the mines under the canal. It was argued that this must be so by analogy to the presumption of law that where a piece of land is conveyed which is bounded by a public highway, or a non-navigable river, the conveyance passes the moiety of the highway or of the river (as the case may be) "unless there is something in the language of the grant indicating an intention to exclude, or something in the subject-matter or in the surrounding circumstances from which such an intention may reasonably be inferred" (per Lord Fitzgerald, (then Fitzgerald J.) in *Dwyer* v. *Rich* (1)). It is very difficult to see the analogy. Here there is no public highway or non-navigable river; there is no authority, nor is there any principle

(1) Ir. Rep. 6 C. L. 144, 149.

which would justify the extension of the rule to such a case as this.

I come now to the Act of Parliament. Sect. 39 reserves to the proprietors of land through which the canal was to be made the mines and minerals lying and being within or under the lands to be set out or made use of for the purpose of the canal, and it authorizes the proprietor to work such mines and minerals, not thereby injuring, prejudicing, or obstructing the canal and the works and conveniences connected therewith. That section says nothing about mines or minerals under or within adjoining lands. As regards such mines and minerals, the rights and liabilities of the mine-owner are left to the general law.

Sect. 40 is of wider application. It enables the owner of adjacent mines, as well as the owner of subjacent mines, to obtain compensation from the canal company for the minerals which he has to leave unworked for the security or preservation of the canal or of the mines. In *Knowles* v. *Lancashire and Yorkshire Railway Company* (1) it was held by this House, following the decision of Lord Cottenham in the case of *Cromford Canal Company* v. *Cutts* (2), that the meaning was that when the working of a mine has reached a point at which the mine-owner finds that, having regard to the proximity of the canal and his statutory liability, he cannot work further without some danger, or cannot work further to the same advantage as he could if the canal were not there, then it is open to him to initiate proceedings, and he is entitled to receive satisfaction for such minerals as shall be thought proper to be left for the security of the canal or the mine. Now, in this case it has been found by the award that there is no reason to apprehend danger to the mine from further working. It has, indeed, been found that the further working of the mine may injure the works connected with the canal, so as to entail upon the proprietors an outlay for some years in the way of repairs. But if the damage which may necessitate those repairs is caused by the appellants working mines, not under or within the lands set out or made use of for the canal, the case is outside of the Act altogether, and there is

(1) 14 App. Cas. 248. (2) 5 Rail. Cas. 442.

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no statutory liability at all hanging over the appellants. The respondents do not want the works to be stopped. Not unnaturally, they prefer to bear the expense of doing such repairs as may from time to time be required to paying down a large sum by way of compensation for coal which will be of little or no use to them.

Under these circumstances, I am of opinion that the appellants cannot insist on being debarred from further working their mines and upon receiving compensation on that footing.

It was said that the judgments of some of their Lordships in *Knowles* v. *Lancashire and Yorkshire Railway Company* (1) went further, and laid down, or at any rate implied, that a mine-owner was entitled to receive compensation in such a case as this. But I think that there is nothing to justify this assertion. It appears to me that it was stated, carefully and clearly, that it was the apprehension of statutory liability—that is, liability for the consequences of working in contravention of the requirements or restrictions of the Act—and apprehension of statutory liability alone, which entitles the mine-owner to compensation when he cannot shew that the further working would injure his mines. It must be remembered that the only question in *Knowles* v. *Lancashire and Yorkshire Railway Company* (1) was whether the words at the conclusion of sect. 37 were to have their ordinary meaning or not. There the mischief had been done; the canal had been let down. No distinction was drawn between damage done by working the mine where it was underneath the canal and working where it was under adjoining land, nor was there anything to shew that there was any possibility of drawing any such distinction. The whole point of the case turned upon the question of statutory liability. The mine-owners who wished to qualify the natural and ordinary meaning of the words on which the canal proprietors relied insisted that there was at least one case where minerals must be left unworked without compensation. But their Lordships did not think so. They held that in every case where there was statutory liability there were means of obtaining compensation.

(1) 14 App. Cas. 248.

For these reasons I am of opinion that the appeal fails, and must be dismissed with costs.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals 24th July 1895.

Solicitors for appellants: *Woodcock, Ryland & Parker, for Tweedale, Sons & Lees, Oldham.*

Solicitors for respondents: *Norris, Allens & Chapman, for G. Jackson, Rochdale.*

[HOUSE OF LORDS.]

THE MAYOR, ALDERMEN AND BURGESSES OF THE BOROUGH OF BRADFORD . . . . . } APPELLANTS;

AND

EDWARD PICKLES . . . . . RESPONDENT.

Watercourse — Water percolating underground — Interference with flow of percolating Water — Mala Fides — Lawful act done with malicious Motive — Bradford Waterworks Act 1854 (17 & 18 *Vict. c. cxxiv.*) *s.* 49.

No use of property which would be legal if due to a proper motive can become illegal because it is prompted by a motive which is improper or even malicious.

The owner of land containing underground water, which percolates by undefined channels and flows to the land of a neighbour, has the right to divert or appropriate the percolating water within his own land so as to deprive his neighbour of it: *Chasemore* v. *Richards* (7 H. L. C. 349). And his right is the same whatever his motive may be, whether bonâ fide to improve his own land, or maliciously to injure his neighbour, or to induce his neighbour to buy him out.

By Lord Watson: The law of Scotland on this point is not accurately stated by Lord Wensleydale in *Chasemore* v. *Richards* (7 H. L. C. at p. 388).

The decision of the Court of Appeal ([1895] 1 Ch. 145) affirmed.

THE following statement of the facts is taken from the judgment of Lord Watson:—

The appellants have purchased under statutory powers, and

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are now vested with the whole undertaking of the Bradford Waterworks Company incorporated by an Act passed in 1854 (17 & 18 Vict. c. cxxiv.), which transferred to that company the undertaking of a corporation, having the same name, created by statute in 1842 (5 Vict. Sess. 2, c. vi.), together with all rights and privileges thereto belonging. The older of these companies acquired, for the purposes of their undertaking, a parcel of land known as Trooper Farm, and also certain springs and streams arising in or flowing through the farm. From these springs and streams the appellants and their predecessors have hitherto obtained a valuable supply of water for the domestic use of the inhabitants of Bradford.

Trooper Farm is bounded on the west and north by lands belonging to the respondent which are about 140 acres in extent. The first of these boundaries, on the west, which is alone of importance in the present case, is a public highway called Doll Lane. The respondent's land to the west of that boundary is on a higher level than Trooper Farm, and has a steep slope downwards to the lane. Its substrata are intersected by two faults running from east to west, one from each end of the boundary, which prevent the escape of percolating water either to the north or south; and the nature and the inclination of the strata are such that the subterranean water which they contain must, by the natural force of gravitation, eventually find its way to Trooper Farm.

The sources from which the appellants derive a supply of water near to the western boundary of Trooper Farm are two in number. The first of these is a large spring, known as Many Wells, which issues from their ground twenty or thirty yards to the east of Doll Lane. The second is a stream to the south of Many Wells, which has its origin in a smaller spring on the respondent's land, close to Doll Lane, at a point known as the Watering Spot, from which the water runs in a definite channel into Trooper Farm.

It is an admitted fact that neither the appellants nor either of the companies whose undertaking is now vested in them ever acquired from the respondent or his predecessors in title any part of their legal right to or interest in the water in their land,

whether above or below the ground; and also that the statutes, to the benefit of whose provisions the appellants are now entitled, make no provision for compensating the respondent, in the event of such right or interest being prejudicially affected by the appellants' undertaking.

In the year 1892 the respondent began to sink a shaft on his land adjoining the lane, and to the west of the Many Wells Spring, and also to drive a level through his land for the professed purpose of draining the strata, with a view to the working of his minerals. These operations had the effect of occasionally discolouring the water in the Many Wells Spring, and also of diminishing to some extent the amount of water in that spring, and in the stream coming from the Watering Spot; and it became apparent that, if persevered in, they would result in a considerable and permanent diminution of the water supply obtainable from these sources. The appellants then brought the present suit, in which they crave an injunction to restrain the respondent from continuing to sink the shaft or drive the level, and from doing anything whereby the waters of the spring and stream might be drawn off or diminished in quantity, or polluted, or injuriously affected.

The appellants alleged in their statement of claim that the respondent had not a bonâ fide intention to work his minerals, and that his intention was to injure the appellants and so to endeavour to induce them either to purchase his land or to give him some other compensation.

North J. being of opinion that the respondent's acts were prohibited by statute granted an injunction (1). The Court of Appeal (Lord Herschell L.C., Lindley and A. L. Smith L.JJ.) reversed this decision and declared that the appellants were not entitled to any of the relief claimed in the action (2).

The Act of 1854 incorporated among others sect. 14 of the Waterworks Clauses Act 1847.

Sect. 49 of the Act of 1854 was almost identical in terms with sect. 234 of the Act of 1842 and ran as follows:—

"It shall not be lawful for any person other than the company to divert alter or appropriate in any other manner than by law

(1) [1894] 3 Ch. 53. (2) [1895] 1 Ch. 145.

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they may be legally entitled any of the waters supplying or flowing from certain streams and springs called 'Many Wells,' arising or flowing in and through a certain farm called 'Trooper' or Many Wells Farm in the township of Wilsden in the parish of Bradford, or to sink any well or pit or do any act matter or thing whereby the waters of the said springs might be drawn off or diminished in quantity; and if any person shall illegally divert alter or appropriate the said waters or any part thereof or sink any such well or pit or shall do any such act matter or thing whereby the said waters may be drawn off or diminished in quantity, and shall not immediately on being required so to do by the company repair the injury done by him, so as to restore the said springs and the waters thereof to the state in which they were before such illegal act as aforesaid, he shall forfeit to the company any sum not exceeding five pounds for every day during which the said supply of water shall be diverted or diminished by reason of any work done or act performed by or by the authority of such person, in addition to the damage which the company may sustain by reason of their supply of water being diminished."

May 9. *Cozens-Hardy* Q.C. and *B. Eyre* for the appellants:—

The respondent in diverting this water is not making a reasonable use of the land. He is acting maliciously, and the cases shew that a user which would otherwise be justifiable ceases to be so when the object is to injure another. This principle was applied in the early case of *Keeble* v. *Hickeringill* (1), in which a decoy was disturbed by shooting. In *Acton* v. *Blundell* (2), in which the right to intercept underground water was established, this limitation is expressed. Tindal C.J. at p. 353 quotes Marcellus: "Si non animo vicini nocendi, sed suum agrum meliorem faciendi"; and the same passage is quoted by Lord Wensleydale in *Chasemore* v. *Richards* (3). Lord Wensleydale says: "Every man has a right to the natural advantages of his soil. . . . But according to the rule of reason and law 'Sic utere tuo ut alienum non laedas,' it seems right to hold that he ought to exercise his

(1) 11 Mod. 74, 131; 11 East, 574, n.
(2) 12 M. & W. 324.
(3) 7 H. L. C. 349, 387.

right in a reasonable manner with as little injury to his neighbour's rights as may be." In *Smith* v. *Kenrick* (1) the same limitation on freedom of action is imposed; and Maule J. says that if a man in the legitimate use of his own land "acts negligently or capriciously and injury results, no doubt he is liable." In *Mogul Steamship Co.* v. *Macgregor, Gow & Co.* (2) Bowen L.J. after saying that a man is legally justified in the bonâ fide use of his property or the exercise of his trade, even if what he does seems selfish or unreasonable, adds: "But such legal justification would not exist where the act was merely done with the intention of causing temporal harm, without reference to one's own lawful gain or the lawful enjoyment of one's own rights." The respondent's conduct comes distinctly within the exceptions there expressed.

[They also contended that the respondent's conduct was forbidden by the Bradford Waterworks Act 1854 s. 49.]

Everitt Q.C., *Tindal Atkinson* Q.C., *Butcher* and *A. P. Longstaffe* for the respondent were not heard.

The House took time for consideration.

July 29. LORD HALSBURY L.C.:—

My Lords, in this action the plaintiffs seek to restrain the defendant from doing certain acts which they allege will interfere with the supply of water which they want, and which they are incorporated to collect for the purpose of better supplying the town of Bradford. North J. ordered the injunction to issue, but the Court of Appeal, consisting of Lord Herschell, Lindley L.J. and A. L. Smith L.J., reversed his judgment.

The facts that are material to the decision of this question seem to me to lie in a very narrow compass. The acts done, or sought to be done, by the defendant were all done upon his own land, and the interference, whatever it is, with the flow of water is an interference with water, which is underground and not shewn to be water flowing in any defined stream, but is percolating water, which, but for such interference, would undoubtedly

(1) 7 C. B. 515, 559. (2) 23 Q. B. D. 598, 618.

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reach the plaintiffs' works, and in that sense does deprive them of the water which they would otherwise get. But although it does deprive them of water which they would otherwise get, it is necessary for the plaintiffs to establish that they have a right to the flow of water, and that the defendant has no right to do what he is doing.

My Lords, I am of opinion that neither of those propositions can be established. Apart from the consideration of the particular Act of Parliament incorporating the plaintiffs, which requires separate treatment, the question whether the plaintiffs have a right to the flow of such water appears to me to be covered by authority. In the case of *Chasemore* v. *Richards* (1), it became necessary for this House to decide whether an owner of land had a right to sink a well upon his own premises, and thereby abstract the subterranean water percolating through his own soil, which would otherwise, by the natural force of gravity, have found its way into springs which fed the River Wandle, the flow of which the plaintiff in that action had enjoyed for upwards of sixty years.

The very question was then determined by this House, and it was held that the landowner had a right to do what he had done whatever his object or purpose might be, and although the purpose might be wholly unconnected with the enjoyment of his own estate.

It therefore appears to me that, treating this question apart from the particular Act of Parliament, and, indeed, apart from the 49th section of the Act of Parliament upon which the whole question turns, it would be absolutely hopeless to contend that this case is not governed by the authority of *Chasemore* v. *Richards* (1).

This brings me to the 49th section of the statute 17 & 18 Vict. c. cxxiv., upon which reliance has been placed. [His Lordship read it.]

Whatever may be said of the drafting of this section, two things are clear: first, that the section in its terms contemplates that persons other than the company may be legally entitled to divert, alter, or appropriate the waters supplying or flowing from

(1) 7 H. L. C. 349.

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the streams and springs; and, secondly, that the acts against which the section is directed must be illegal diversion, alteration, or appropriation of the said waters.

The natural interpretation of such language seems to me to be this: that whereas the generality of the language of the section might apply to any alteration or appropriation of waters supplying or flowing from the streams and springs called "Many Wells," the section only intended to protect such streams and springs and supplies as the company should have acquired a right to by purchase, compensation, or otherwise, but in such-wise as should vest in them the proprietorship of the waters, streams, springs, &c. And lest the generality of the language should give them more than that to which they had acquired the proprietary right, the legal rights of all other persons were expressly saved; and upon this assumption the latter part of the section makes penal the illegal diversion, alteration, or appropriation of any streams, &c., of which, by the hypothesis, the company had become the proprietor.

I do not think that North J. does justice to the language of the section when he says that "the section enacts that a man is not to do certain specified things except so far as he may lawfully do them." The fallacy of that observation (with all respect to North J.) resides in the phrase "certain specified things." If my reading of the section be correct, the thing that is prohibited is taking or diverting water which has been appropriated and paid for by the company; but the thing which is not prohibited is taking water which has not reached the company's premises, to the property in which no title is given by the section, and which, by the very act complained of, never can reach the company's premises at all. To use popular language, therefore, what is prohibited is taking what belongs to the company, and what is not prohibited is taking what does not belong to the company.

My Lords, I have used popular language because I have no doubt that the draftsman who drew the section was encountered with the proposition in his own mind that you could not absolutely assert property of percolating water at all. You may have a right to the flow of water; you may have a property in the

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water when it is collected and appropriated and reduced into possession; but, in view of the particular subject-matter with which the draftsman was dealing, it seems to me intelligible enough why he adopted the phraseology now under construction.

It appears to me that this is the true construction of the section from the language itself. But I confess I can entertain no doubt that the mere fact that the section, as construed by the plaintiffs, affords no right to compensation to those whose rights might be affected, is conclusive against the construction contended for by the plaintiffs.

The only remaining point is the question of fact alleged by the plaintiffs, that the acts done by the defendant are done, not with any view which deals with the use of his own land or the percolating water through it, but is done, in the language of the pleader, "maliciously." I am not certain that I can understand or give any intelligible construction to the word so used. Upon the supposition on which I am now arguing, it comes to an allegation that the defendant did maliciously something that he had a right to do. If this question were to have been tried in old times as an injury to the right in an action on the case, the plaintiffs would have had to allege, and to prove, if traversed, that they were entitled to the flow of the water, which, as I have already said, was an allegation they would have failed to establish.

This is not a case in which the state of mind of the person doing the act can affect the right to do it. If it was a lawful act, however ill the motive might be, he had a right to do it. If it was an unlawful act, however good his motive might be, he would have no right to do it. Motives and intentions in such a question as is now before your Lordships seem to me to be absolutely irrelevant. But I am not prepared to adopt Lindley L.J.'s view of the moral obliquity of the person insisting on his right when that right is challenged. It is not an uncommon thing to stop up a path which may be a convenience to everybody else, and the use of which may be no inconvenience to the owner of the land over which the path goes. But when the use of it is insisted upon as a right, it is a familiar mode of testing that right to stop the permissive use, which the owner of the land

would contend it to be, although the use may form no inconvenience to the owner.

So, here, if the owner of the adjoining land is in a situation in which an act of his, lawfully done on his own land, may divert the water which would otherwise go into the possession of this trading company, I see no reason why he should not insist on their purchasing his interest from which this trading company desires to make profit.

For these reasons, my Lords, I am of opinion that this appeal ought to be dismissed with costs, and that the plaintiffs should pay to the defendant the costs both here and below.

LORD WATSON (after stating the facts given above):—

My Lords, it is clear that, apart from any privilege which may have been conferred upon them by statute, the respondent, as in a question with the appellants, has a legal right to divert or impound the water percolating beneath the surface of his land, so as to prevent its reaching Trooper Farm, and feeding, or assisting to feed, the Many Wells Spring or the stream flowing from the Watering Spot. Upon that point there can be no doubt since *Chasemore* v. *Richards* (1) was decided by this House in the year 1859. But the appellants pleaded at your Lordships' Bar, as they did in both Courts below, that the principle of *Chasemore* v. *Richards* (1) is inapplicable to the present case, because, in the first place, the operations contemplated and commenced by the respondent are by statute expressly prohibited; and, in the second place, these operations were designed and partly carried out by the respondent, not with the honest intention of improving the value of his land or minerals, but with the sole object of doing injury to their undertaking.

The statutory provisions upon which the appellants rely as supporting the first of these pleas are to be found in sect. 234 of the Act of 1842, and in sect. 49 of the Act of 1854, which is a mere repetition of the previous enactment. The clause relates to the Many Wells Springs, an expression which, as the context shews, includes the stream coming from the Watering Spot. It contains two separate enactments, the one of them prohibitory and the

(1) 7 H. L. C. 349.

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other penal. First of all, it declares that it shall not be lawful "for any person other than the said company to divert, alter, or appropriate, in any other manner than by law they may be legally entitled," any of the waters "supplying or flowing from" these springs, or to sink any well or pit, or to do any act, matter, or thing whereby "the waters of the said springs" may be drawn off or diminished in quantity. That declaration is followed by the provision that "if any person shall illegally divert, alter, or appropriate the said waters, or any part thereof, or sink any such well or pit, or shall do any such act, matter, or thing whereby the said waters shall be drawn off or diminished in quantity," and shall not on being required to do so by the company, immediately restore the springs and waters to the same condition in which they were before the illegal act, they shall be liable to pay five pounds to the company for each day until restoration is made, besides compensating the company for any damage sustained through their illegal act.

The appellants endeavoured to construe the prohibitory clause as effecting a virtual confiscation in their favour of all water rights in or connected with the respondent's land lying to the west of Trooper Farm. It appears to me to be exceedingly improbable that the Legislature should have intended to deprive a landowner of part of his property for the benefit of a commercial company without any provision for compensating him for his loss. But it is not necessary to rely upon probabilities, because, in my opinion, the language of the clause is incapable of bearing such an interpretation. I think the plain object of the statutory prohibition, which has two distinct branches, was to give protection to the supply of water which had been acquired by or belonged to the company for the time being; and that it was not meant to forbid, and does not prevent, any legitimate use made by a neighbouring proprietor of water running upon or percolating below his land before it reached the company's supply and became part of their undertaking.

The first branch makes it unlawful for any person other than the company to divert, alter, or appropriate any of the "waters now supplying" the Many Wells Springs, which appear to include sources of supply existing upon lands adjacent to Trooper

Farm. Had the prohibition been absolute, it would have struck against the operations of the respondent; but it is subject to the qualification that the respondent, or any landowner similarly situated, may lawfully divert those waters which ultimately feed the Many Wells Springs, so long as he does so in any manuer which is not in excess of his common law rights. The respondent's operations, of which the appellants complain, are within his proprietary right, and are therefore not obnoxious to that part of the prohibition.

The second branch, which prohibits the sinking of wells and other operations, has, in my opinion, no reference to outside waters more or less distant which might ultimately find their way to the Many Wells Springs. It relates to "the waters of the said springs"—an expression which can only denote the waters which have actually reached the Many Wells Springs, or some channel or reservoir which has been prepared for their reception upon their issuing from these springs. The prohibition gives effective protection against the withdrawal or diminution, either by an adjacent proprietor or any other person, of waters which have come within the dominion of the appellants. But it does not prevent the diversion or impounding by an adjacent proprietor of water in his own land which has never reached that point, so long as his operations are such as the law permits. For these reasons, in so far as concerns the first plea urged for the appellants, I concur in the judgment of the Court of Appeal.

The second plea argued by the appellants, which was rejected by both Courts below, was founded upon the text of the Roman law (Dig. lib. 39, tit. 3, art. 1, s. 12), and also, somewhat to my surprise, upon the law of Scotland. I venture to doubt whether the doctrine of Marcellus would assist the appellants' contention in this case; but it is unnecessary to consider the point, because the noble and learned Lords who took part in the decision of *Chasemore* v. *Richards* (1) held that the doctrine had no place in the law of England.

I desire, however, to say that I cannot assent to the law of Scotland as laid down by Lord Wensleydale in *Chasemore* v. *Richards*. (2) The noble and learned lord appears to have

(1) 7 H. L. C. 349. (2) 7 H. L. C. at p. 388.

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accepted a passage in Mr. Bell's Principles (sect. 966), which is expressed in very general terms, and is calculated to mislead unless it is read in the light of the decisions upon which it is founded. I am aware that the phrase "in aemulationem vicini" was at one time frequently, and is even now occasionally, very loosely used by Scottish lawyers. But I know of no case in which the act of a proprietor has been found to be illegal, or restrained as being in aemulationem, where it was not attended with offence or injury to the legal rights of his neighbour. In cases of nuisance a degree of indulgence has been extended to certain operations, such as burning limestone, which in law are regarded as necessary evils. If a landowner proceeded to burn limestone close to his march so as to cause annoyance to his neighbour, there being other places on his property where he could conduct the operation with equal or greater convenience to himself and without giving cause of offence, the Court would probably grant an interdict. But the principle of aemulatio has never been carried further. The law of Scotland, if it differs in that, is in all other respects the same with the law of England. No use of property, which would be legal if due to a proper motive, can become illegal because it is prompted by a motive which is improper or even malicious.

I therefore concur in the judgment which has been moved by the Lord Chancellor.

LORD ASHBOURNE:—

My Lords, I concur. To my mind the case is clear, and turns upon considerations sufficiently simple and far from obscure.

The plaintiffs have no case unless they can shew that they are entitled to the flow of the water in question, and that the defendant has no right to do what he is doing. Putting aside the statutes, the defendant's rights cannot be seriously contested. The law stated by this House in *Chasemore* v. *Richards* (1) cannot be questioned. Mr. Pickles has acted within his legal rights throughout; and is he to forfeit those legal rights and be punished for their legal exercise because certain motives are

(1) 7 H. L. C. 349.

imputed to him? If his motives were the most generous and philanthropic in the world, they would not avail him when his actions were illegal. If his motives are selfish and mercenary, that is no reason why his rights should be confiscated when his actions are legal.

It is to be noted that the defendant or his predecessors in title never parted with any of their legal rights; it is not suggested that the plaintiffs, by agreement or otherwise, ever acquired them; and no indication is given that there is any intention to compensate the defendant for his legal rights sought to be appropriated or injuriously affected by the plaintiffs.

The appellants' contention on the construction of the statutes would practically confiscate the defendant's water rights. I see nothing in the statutes to interfere with or prejudice his legal rights. Very clear words would be required to support the contention that legal rights have been swept away without compensation. Waters that have come under the control of the appellants are fully protected; but there is not a word to hinder or cramp the action of Mr. Pickles unless he acts "illegally," or proceeds "in any other manner than by law he may be legally entitled."

I therefore concur in the order proposed.

LORD MACNAGHTEN:—

My Lords, for forty years the corporation of Bradford have supplied their town with water. They were empowered to do so by an Act of Parliament passed in 1854, which authorized and required them to purchase the undertaking of a then existing company called "The Bradford Waterworks Company."

The chief source of their water supply was taken over from the company. It comes from a cluster of springs known as "The Many Wells." These springs issue from the lower slope of a hillside some distance from the town. Above them, in the immediate neighbourhood, there is a tract of land belonging to Mr. Pickles, the respondent. Owing to the fall of the ground and the nature and lie of the strata beneath the surface, Mr. Pickles' land forms a sort of gathering-room or reservoir for

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subterranean water. Two faults, nearly parallel to each other, run downwards through it, and there is a bottom of impermeable clay. At present there is no way of escape for the imprisoned waters except by the Many Wells Springs.

Within the ambit of his own land Mr. Pickles has set about making a tunnel or drift which, apparently, is intended to pierce one of the two faults that keep the underground water within bounds. If this is done the result, it is said, will be to allow the water to run off in some other direction.

The corporation claim an injunction to restrain Mr. Pickles from going on with the proposed work. They put their case in two ways. They say that under the circumstances the operation which Mr. Pickles threatens to carry out is something in excess of his rights as a landowner. Failing that ground, they maintain that his proceedings are in contravention of the express terms of their special Act.

As regards the first point, the position of the appellants is one which it is not very easy to understand. They cannot dispute the law laid down by this House in *Chasemore* v. *Richards*. (1) They do not suggest that the underground water with which Mr. Pickles proposes to deal flows in any defined channel. But they say that Mr. Pickles' action in the matter is malicious, and that because his motive is a bad one, he is not at liberty to do a thing which every landowner in the country may do with impunity if his motives are good. Mr. Pickles, it seems, was so alarmed at this view of the case that he tried to persuade the Court that all he wanted was to unwater some beds of stone which he thought he could work at a profit. In this innocent enterprise the Court found a sinister design. And it may be taken that his real object was to shew that he was master of the situation, and to force the corporation to buy him out at a price satisfactory to himself. Well, he has something to sell, or, at any rate, he has something which he can prevent other people enjoying unless he is paid for it. Why should he, he may think, without fee or reward, keep his land as a store-room for a commodity which the corporation dispense, probably not

(1) 7 H. L. C. 349.

gratuitously, to the inhabitants of Bradford? He prefers his own interests to the public good. He may be churlish, selfish, and grasping. His conduct may seem shocking to a moral philosopher. But where is the malice? Mr. Pickles has no spite against the people of Bradford. He bears no ill-will to the corporation. They are welcome to the water, and to his land too, if they will pay the price for it. So much perhaps might be said in defence or in palliation of Mr. Pickles' conduct. But the real answer to the claim of the corporation is that in such a case motives are immaterial. It is the act, not the motive for the act, that must be regarded. If the act, apart from motive, gives rise merely to damage without legal injury, the motive, however reprehensible it may be, will not supply that element.

On this point both North J. and the Court of Appeal decided against the corporation. And the decision, as it seems to me, is plainly right.

On the second point, on which North J. was in favour of the corporation and the Court of Appeal against them, there is certainly more to be said. I quite agree with the Court of Appeal in the result at which they have arrived. But, speaking for myself, I rather take leave to doubt whether the section of the special Act on which the question turns is so unsatisfactory, so ill-drawn, and so difficult to construe as it seemed to be to the Court of Appeal.

The old waterworks company was incorporated by an Act passed in 1842. It was dissolved and re-incorporated in 1854 in view of the immediate transfer of the undertaking to the corporation.

In the Act of 1854, the provisions of which were kept in force for the benefit of the corporation, the section in question is the 49th. But that section is merely a reproduction of sect. 234 in the Act of 1842. And it will be more convenient to deal with the earlier Act.

The Act of 1842 scheduled certain lands which the company were empowered to take. Among them was part of a farm belonging to one Seth Wright, which was known as Trooper or Many Wells Farm. By sect. 233 the company were authorized

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to divert or alter the course of a certain beck called Hewenden Beck, which is a tributary of the River Aire, "and also to divert and take the water from" the Many Wells Springs, described as "the springs and streams of water called Many Wells, arising or flowing in and through . . . Trooper or Many Wells Farm."

At the date of the passing of the Act, the waters issuing from the Many Wells Springs in Trooper Farm, and a stream which rose in the adjoining land, flowed in several defined channels through Trooper Farm into Hewenden Beck, which forms one of the boundaries of the farm. The scheduled portion of the farm comprised apparently some but not all of those channels. However, after the Act was passed, the company purchased the whole of Trooper Farm; and, as required by the Act, they made compensation to the millowners on Hewenden Beck for the loss of the waters of the Many Wells Springs.

Sect. 234 is a protective clause corresponding in the main with sect. 14 in the Waterworks Clauses Act 1847. It was to come into operation after the purchase of the Many Wells Springs.

According to the ordinary course of legislation in this country, a clause of that sort is intended to protect property, rights, and interests which have been acquired by purchase, not to transfer arbitrarily from one person to another property and rights for which nothing has been paid, and for which no compensation is provided.

In the first place, the section says that, "After the Many Wells Springs have been purchased by the company, it shall not be lawful for any person other than the said company to divert, alter, or appropriate in any other manner than by law they may be legally entitled any of the waters now supplying or flowing from the same." Both as regards the underground sources of the springs and as regards the streams flowing from them in their natural course it forbids any act by any person in excess of his legal rights. At that time it must be remembered that the rights of landowners in regard to underground water had not been finally determined. If the view which commended itself to the Court of Exchequer in *Dickinson* v. *Grand Junction Canal Company* (1) had been established, the proposed action of

(1) 7 Ex. 282.

Mr. Pickles would, no doubt, have been illegal. As it is, there is nothing in the first part of the prohibition to restrict or curtail his rights as a landowner in dealing with underground water percolating through his land in unknown channels.

In the second place, the section declares that no person but the company is "to sink any well or pit, or do any act, matter, or thing whereby the waters of the said springs may be drawn off or diminished in quantity." What is the meaning of the expression, "The waters of the said springs"? The natural and obvious meaning seems to me to be the waters issuing from the springs, such as they happen to be in quantity and volume, at the point of issue, or in one case at the point of entry, into Trooper Farm. The expression cannot include the underground sources which serve to feed the springs. Otherwise you would have this singular result, that things which by reason of the saving of existing rights are treated as legal and permissible in one part of the clause are treated as illegal and prohibited by another. It must mean the water which the company were authorized to "divert and take from" those springs which the section at its commencement assumes the company to have purchased—not the waters which supply the springs, but the waters which the springs supply. A comparison of other sections in the Act will confirm this view if any confirmation is required. The expression, "The waters of the said 'Many Wells'" occurs in sect. 275, and then it is evidently synonymous with the following words in a parallel passage in sect. 238: "The water issuing from the springs of water before mentioned called 'Many Wells,' and which is hereby authorized to be taken and diverted for the purposes of this Act."

After the company had compensated the mill-owners on Hewenden Beck and purchased Trooper Farm, the waters of the Many Wells Springs at and from the point of issue in Trooper Farm, and the water of the stream which rose in the adjoining land at and from the point of its entry into Trooper Farm, became the absolute property of the company, and it was the duty of the company to carry those waters to Bradford. No one was to interfere with them. Any such interference is characterised, in a later part of the section, as an illegal act.

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And, indeed, it seems to me very difficult to conceive how such an act could in any case be legal, unless the company constructed their works in a perverse and foolish manner. No one from whom the company acquired land or even an easement for the purposes of their works could lawfully let down those works. No one else, it may be assumed, would be in a position to do so. No one could lawfully tap their aqueducts or conduits.

I am of opinion that the act which Mr. Pickles proposes to do is not within either of the two classes of prohibited acts mentioned in sect. 234. It is not within the first class, because at the time of the passing of the Act his predecessor was legally entitled, and he is now legally entitled, to do the thing which is complained of. It is not within the second class, because Mr. Pickles does not propose to do anything which can have the effect of drawing off or diminishing in quantity the waters of the Many Wells Springs, such as they may be at the point of issue in Trooper Farm, or as regards the stream which does not rise in Trooper Farm at the point of its entry into that farm.

It was argued somewhat faintly that sect. 49 of the Act of 1854 must have a wider meaning than that which I think ought to be attributed to sect. 234 of the Act of 1842, because the Act of 1854 incorporates the Waterworks Clauses Act of 1847, and sect. 14 of that Act covers, it is said, everything which is covered by sect. 234 of the Act of 1842 if it be construed as it seems to me it ought to be construed. There would be very little in such an argument under any circumstances, because it is only natural that the promoters of the legislation of 1854 would, on the reconstruction of the company, desire to retain or re-enact every clause in the former Act which could make for their protection. But the truth is, that the section of the Waterworks Clauses Act of 1847, which corresponds with sect. 49 of the Act of 1854, does not apply to the Many Wells Springs. They were purchased under the Act of 1842. The Act of 1854, which incorporates the Waterworks Clauses Act 1847, declares that in construing that Act the expression "the special Act" shall mean the Act of 1854. It does not mean or include the Act of 1842.

I am, therefore, of opinion that this appeal should be dismissed with costs.

Order appealed from affirmed and appeal dismissed with costs here and below: Action dismissed.

Lords' Journals 29th July 1895.

Solicitors for appellants: *Cann & Son for W. T. McGowen, Bradford.*

Solicitors for respondent: *Ullithorne, Currey & Currey for W. & G. Burr & Co., Keighley.*

[PRIVY COUNCIL.]

J. C.* 1895 May 10, 16; July 29.

MARSHALL . . . . . DEFENDANT;

AND

ORPEN . . . . . PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF THE CAPE OF GOOD HOPE.

Law of the Cape of Good Hope, No. 3 of 1864, Sched. 17, s. 2, head B—Construction—Authority of a company "to carry on business in the colony"—Licence.

Where a company was authorized by its memorandum of association to carry on its business in any part of the world:—

Held, that it was not taxable under No. 3 of 1864, Sched. 17, s. 2, head (*b*), which, on its true construction, relates to companies, some of whose dealings are specifically authorized "to be carried on in this colony."

Colonial Government v. *British South Africa Company* (9 Juta, 280) approved.

APPEAL from an order of the Supreme Court (Sept. 4, 1894), made upon a special case raising the question whether the company in question was, under the circumstances stated in the judgment of their Lordships, liable to pay annually to the Government 1*s.* per cent. on its subscribed capital as stamp duty on a licence to carry on its business in the colony—in other words, £180 per annum.

The Supreme Court held that it was liable under No. 3 of 1864, Sched. 17, s. 2, and based its decision on the ground that, being authorized by its memorandum of association "to carry on business in any part of the world," it came within the section which related to companies authorized to carry on business within the Cape of Good Hope.

The case was argued twice on the 10th and 16th of May; the

* *Present*:—THE LORD CHANCELLOR, LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, LORD SHAND, LORD DAVEY, and SIR RICHARD COUCH.

Committee upon the first occasion being composed as stated below (1).

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Haldane, Q.C., and *Abraham*, for the appellant, contended that head B of the section in question only applies, on its true construction, to companies specially formed for the purpose of carrying on business within the colony, or at least to those which are specially authorized to include the colony within their sphere of operations. It could not reasonably have been intended to apply to a company whose main business is carried on elsewhere, but which incidentally through its agent or otherwise enters into some transactions in the colony. Acts imposing liability upon the subject should be construed strictly. Reference was made to *Colonial Government* v. *British South Africa Company* (2), and to *Reg.* v. *Pistorius* (3).

Bosanquet, Q.C., and *H. E. Gurner*, for the respondent, contended that the authority contained within the memorandum brought the company within the scope of the section in question, and that it was taxable accordingly.

Haldane, Q.C., replied.

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The judgment of their Lordships was delivered by

LORD HOBHOUSE :—

The question raised in this appeal was decided by the Supreme Court on a special case stated in the suit. The plaintiff, now respondent, is Receiver-General of the Revenue. The defendant, now appellant, is the agent in Capetown of J. Hepworth & Co., Limited, a joint stock company which has through the agency of the defendant carried on business there continuously since May, 1893.

The plaintiff asserts, and the defendant denies, that the company is bound to take out a licence on which duty is payable at the rate of 1*s.* for every £100 of the subscribed capital of the

(1) Present :—Lord Hobhouse, Lord Morris, Lord Davey, and Sir Richard Couch.

(2) 9 Juta, 280.

(3) 5 Juta, 106.

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company. That capital is £360,000, and the sum claimed is £360, being licence duty for two years.

The enactment under which duty is claimed is Sched. 17 of No. 3 of 1864, sects. 2 and 5 of which originally stood as follows:—

"2. Every joint stock company carrying on business in this colony shall annually take out a licence for which there shall be payable for every £100 of the subscribed capital of such company 1*s*.

"The term joint stock company shall for the purpose of the above licence embrace:

"(*a*.) Every company having a capital stock divided into shares of which company the chief seat or principal place where its business is managed shall be within this colony.

"(*b*.) Every such company, of which the chief seat or principal place where its business is managed shall not be within this colony, but of which any of the dealings shall, by the deed or other instrument regulating such company be described as to be carried on in this colony. But the licence of any such last-mentioned company shall be reckoned upon one-half, instead of upon the whole of its subscribed capital.

"5. When any joint stock company, not being such a company as has been above described, but are doing business in this colony through the instrumentality of some agency in this colony, then such last-mentioned company shall annually take out a licence of the value of fifty pounds."

By subsequent Acts, No. 20 of 1884, and No. 38 of 1887, the second sentence of head (*b*) and sect. 5 have been repealed, and other provisions made. But these alterations of the law do not affect the question whether the defendant's firm falls within the terms of head (*b*).

By their memorandum of association the registered office of the company is to be situate in England, and its objects are—"to carry on in any part of the world the businesses of clothiers, &c., and do certain subsidiary things in the United Kingdom or elsewhere." There is nothing to indicate more specifically any place of business or dealing.

The Supreme Court have decided that the company so formed falls within head (*b*). The opinion of the three learned judges who formed the Court is the most fully stated by Buchanan J., the acting Chief Justice. He says:—

"The issue narrows itself down to this. Can it be held that a deed of incorporation which authorizes a joint stock company to carry on business in any part of the world is an instrument in which the business of the company is 'described as to be carried on in the colony'? . . . I admit that the section must be strictly construed, but in my opinion it would be a straining of the rules of construction to say that the defendant company does not come within the section. The company is not acting beyond its memorandum of association in directly carrying on business in this colony. Having opened such a business here, and not merely an agency, we are I think bound to hold that the deed in authorizing business to be carried on in any part of the world includes and describes this colony as a place in which such business is to be carried on."

Their Lordships are unable to follow this reasoning. If the company's memorandum had been absolutely silent as to locality, it would not have been acting beyond it in directly carrying on its business in Capetown, and yet to say in such a case that its business was described as to be carried on in Capetown would be little short of an abuse of language. To say that a business is to be in a place named is one thing. To say that it may be carried on anywhere, which, of course, includes every conceivable place, is a totally different thing.

It is true that the foregoing remarks only go to shew how an ordinary reader of the memorandum would answer the question whether any of the company's dealings are described as to be carried on in Cape Colony; whereas the controversy is, what the Cape legislature meant by those expressions. But on that point the plaintiff is in still greater difficulty, especially having regard to the wholesome maxim that the subject is not to be taxed under ambiguous expressions.

It appears to their Lordships that heads (*a*) and (*b*) are intended to serve as a definition or limitation of the general expression "every joint stock company carrying on business in this colony."

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For though the Act uses the word "embrace," it is so obvious that the companies described in (*a*) and (*b*) must be embraced in the more general expression, that it would be idle to add two clauses for the purpose of saying that they are. The inference is that the draftsman has used inaccurate, but by no means uncommon, language, and has said only that the general terms embrace the specified particulars, meaning to say that they embrace no more. No company, therefore, is to be taxed under s. 2 unless it comes within the terms of (*a*) or (*b*).

Many other companies doing business by agency must fall within the repealed s. 5, as the defendant says that his company does. Whether that section was intended to include all company business not within (*a*) or (*b*), or whether, if so intended, it does include all, need not be discussed. Nor is the defendant bound to shew for what reason, fiscal or political, head (*b*) was enacted. It is for those who seek to tax him under that head to shew that he falls within it. For some reason or other the legislature have thought fit to make three divisions of companies—first, those who have their chief seat of business in the colony, and who are taxed on their whole capital at the higher rate; secondly, those of which any of the dealings are described as to be carried on in the colony, who are taxed on their whole capital at the lower rate; and thirdly, those who, not coming under either of the above heads, do business in the colony by some agency, and who are taxed at a fixed sum. According to the plaintiff's reasoning, the second class comprises all companies not under head (*a*) whose charters do not preclude them from carrying on business in the colony. To their Lordships it seems reasonably clear that the second class is intended to comprise those only in whose constitution there is at least something specially pointing to the Cape as a place of business. What kind or amount of indication would attract head (*b*) cannot be decided beforehand. Each case must turn upon its own facts. In this case there is nothing whatever to indicate the Cape as a place of business any more than any other part of the world.

Furthermore, it appears that this point has already been the subject of decision in the colony in the case of *Colonial Govern-*

ment v. *British South Africa Company.* (1) In that case the petitioners for a charter stated that their object was to carry into effect certain operations within a described region "or elsewhere in Africa." The charter approves of the purposes of the petitioners, and empowers the company to acquire rights and property "in Africa," and to hold land and to establish "agencies in any of our colonies or possessions or elsewhere." The company made a railway in Cape Colony, and set up an office in Capetown. The Treasury sought to bring them under head (*b*). The judgment of the Supreme Court was delivered by De Villiers C.J., who said that he could find nothing in the charter which describes this colony as the place in which the business of the company is to be carried on.

Two of the learned judges who sat in that case sat also in the present case; but they do not address themselves to the question how it can be that Cape Colony is not indicated in the permission to carry on business in Africa, but is indicated in the permission to carry on business anywhere in the world. Buchanan J., indeed, appears to think that the ground of the earlier decision was the fact that the company was not carrying on business in Cape Colony. That, however, is not so. The Chief Justice did, it is true, think that such was the effect of the evidence, probably because the company had ceased to work their railway; but there was an express admission by the company that they were so carrying on business, and the judgment proceeded on that footing. The two decisions cannot stand together, and, in their Lordships' opinion, the former is the right one.

The result is, that their Lordships will humbly advise Her Majesty to discharge the judgment appealed from, and to dismiss the action with costs. The respondent must pay the costs of this appeal.

Solicitors for appellant: *Patersons, Snow, Bloxam & Kinder.*
Solicitors for respondent: *Wilson, Bristows & Carpmael.*

(1) 9 Juta, 280.

[PRIVY COUNCIL.]

J. C.* 1895 July 2, 3, 27.

LA BANQUE D'HOCHELAGA . . . . DEFENDANTS.

AND

JODOIN AND OTHERS . . . . . PLAINTIFFS;

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA, IN THE PROVINCE OF QUEBEC.

Principal and Agent—Construction of Power of Attorney—"Son procureur général et spécial"—Liability of Principal—Civil Code, art. 181.

Where by a document indorsed "procuration générale et spéciale" a wife being sole owner constituted her husband "son procureur général et spécial" to administer her affairs, specifying such acts as drawing bills of exchange and making promissory notes:—

Held, that the wife's liability extended to all promissory notes granted by the husband, and was not limited by art. 181 of the Civil Code to such notes as were required for purposes of the administration.

APPEAL from a decree of the Court of Queen's Bench (Sept. 27, 1893) reversing a decree of the Superior Court (March 15, 1892), which had dismissed the respondents' suit.

The question decided in the appeal was whether the power of attorney in suit granted by a wife being sole owner to her husband was on its true construction a general power limited by art. 181 of the Civil Code as regards the making of promissory notes to such as were required for purposes of administration, or whether it specifically gave powers not so limited.

E. Blake, Q.C., and *Beique*, Q.C. (both of the Quebec Bar), for the appellants.

Fullarton, Q.C., and *Talbot*, for the respondents.

The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

The plaintiffs, who are now respondents, are the testamentary executors of Madame Marie Hélène Jodoin, widow of Amable

* *Present*:—LORD WATSON, LORD HOBHOUSE, LORD MORRIS, and SIR RICHARD COUCH.

Jodoin fils. The suit is brought to recover from the defendants, now appellants, La Banque d'Hochelaga, 100 shares, of the par value of $100 a share in that company, and also the dividends declared on the same shares since December, 1879. These shares were purchased in the name of the husband Amable Jodoin, were transferred by him into the name of the wife Marie Hélène Jodoin, and were appropriated and sold by the bank to meet debts which they alleged to be due from both husband and wife.

The principal points of contention have been, first, whether as between husband and wife the shares were the property of the wife; and secondly, whether the wife could be made liable on certain promissory notes signed by the husband in his own name and also in her name as her procureur or attorney.

It is common ground that the husband was quite destitute of property when he married; that the wife had a large fortune, perhaps half a million dollars; that by their marriage contract the spouses were separate in property; and that the husband managed the wife's property.

On the 28th of September, 1870, a document indorsed "Procuration générale et spéciale" was duly executed by both spouses, whereby the wife constituted the husband "Son procureur général et spécial" to administer for her and in her name all her goods and affairs. Then the document specifies a number of different acts which the attorney may perform, and amongst them the following:—

"Et pour et au nom de la dite constituante gérer, faire et transiger toutes affaires quelconques avec les Banques incorporées ayant leurs Bureaux d'affaires en la dite Cité de Montréal et ailleurs, tirer, accepter, transporter et endosser toutes lettres de change ou traites; faire, consentir, délivrer et endosser tous billets promissoires."

On the 30th of July, 1871, a declaration was executed by the husband, in which he stated the power of attorney, and that he had administered accordingly, and had, in order to watch the better over his wife's interests, at her request taken up in his own name divers "sommes de deniers" which nevertheless really belonged to her, and also certain shares in banks (not the appellant bank) which, though apparently his, were really hers. Then

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he declared that he had nothing of his own, and no means of ever acquiring such large sums for himself; and that to avoid any difficulty which might arise on his death, everything standing in his name should be deemed to belong to his wife.

On the 20th of August, 1873, the husband subscribed for the shares in question, and about the same time he opened an account with the bank in his own name. The account so continued until it was transferred into the name of the wife, apparently on the 1st of October, 1875, but the exact date is not material. Both accounts were ordinary current accounts drawn upon by the husband; and on the credit side were placed from time to time sums advanced by the bank on the security of promissory notes which, or some of which, have been renewed and have never been paid. These notes were indorsed by the husband in his own name, and then in the name of the wife by procuration of the husband. Except for the change in the name of the customer, the course of practice on the accounts never varied from beginning to end of the dealings. The shares also were transferred into the name of the wife about the same time as the transfer of the account, namely, on the 11th of October, 1875.

On the 19th of December, 1876, another declaratory act was passed by the husband (the wife also intervening) to the same effect as the declaration on the 30th of July, 1871. It stated explicitly that the husband was to take no profit and to suffer no loss by the personal transactions in which his name was used.

On the 27th of February, 1877, another declaratory act was passed by the spouses, and by Pierre Jodoin, their son, one of the present plaintiffs. After referring to the recent declaration of the 19th of December, and stating that it thereby appeared that all the seeming possessions of the husband were really the property of the wife, and that the husband was carrying on an immense foundry under the firm of Jodoin et Cie., but with the funds of the wife, the two made over the foundry business to their son.

In September, 1879, Pierre became insolvent. In the course of the same year Madame Jodoin's affairs were much embarrassed, and, as the bank claimed that she was in debt to them, the

directors ordered her shares to be transferred to the president. It appears that they were sold soon afterwards, and the proceeds appropriated to reduce the bank's claim. On the 8th of January, 1880, the husband died. The wife survived till the 29th of January, 1887. She never made any claim for the shares, nor for dividends which were regularly declared half-yearly from the 2nd of January, 1882, to the 2nd of January, 1887. In December, 1887, her executors brought the present action.

It is said that the dealings of the bank with the shares were irregular, and that they should have given notice to the alleged debtor before proceeding to sell. It is not, however, suggested that she suffered any loss by this irregularity, or at any rate not such loss as would make her the bank's creditor instead of its debtor. This point, therefore, may be disregarded.

As regards the ownership of the shares there can be no doubt. The difficulties suggested with reference to transfer of property as between spouses do not occur here. There was no transfer of beneficial interest. Both Courts have found that the repeated declarations of the parties respecting the husband's apparent property were genuine. The husband had nothing; the wife had all. His transfer to his wife did nothing except to bring the formal and apparent title into accord with the real and substantial one.

The question whether the wife was in debt to the bank turns upon her liability in respect of the promissory notes. If she was liable on them, their amount is greater than the value of the shares, and the plaintiffs cannot recover anything. Her liability on some is admitted, but as to the larger part it is disputed. The Superior Court held that she was liable on her husband's signature. The learned judge considered that this conclusion was a necessary result of the power of attorney, coupled with the establishment of the fact that everything in the husband's name belonged to the wife. He therefore dismissed the action. The Court of Queen's Bench came to a different conclusion. They condemned the bank to restore the shares or to pay their value, reserving certain questions, which, according to their Lordships' view of the case, cannot arise.

The main argument offered in support of this view is that the

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power of attorney does not authorize the making of promissory notes. It is said to be a general power, and, therefore, by art. 181 of the Civil Code, restricted to notes required for purposes of administration. No doubt the power is general; but it is also special, not only in name, but because it specifies a number of particular acts, among which are, the transaction of business with banks, drawing bills of exchange, and making promissory notes. Mr. Fullarton produced no authority to shew that in an instrument so framed each particular act must be limited to an act of administration, because the whole series is ushered in by a grant of general power to conduct and manage property and affairs; nor does such a limitation seem reasonable. Their Lordships hold that the wife, being as between her and her husband sole owner of property, gave him full power to make promissory notes in her name. They cannot see why the bank should not trust to this power, or why it should make inquiry as to the particular state of the wife's affairs which called for an advance of money. The whole affair was the wife's affair.

Whether the advances were or were not for general administration in the sense of the Civil Code does not appear. There is no evidence on that point. The Court of Queen's Bench have decided against the bank, apparently because the advances were so large that the bank must have known that they could not be required for the administration of the wife's property. Considering her large fortune, and the immense foundry which up to February, 1877, was hers, that assumption is very doubtful. The bank, however, were not bound to enter on any such inquiry, or to look beyond the clear terms of the power of attorney.

This view of the husband's position appears to their Lordships to dispose of nearly all the reasoning in support of the decree. But it may be added that the wife certainly had the benefit of the advances. Mr. Fullarton undertook to shew the contrary, but failed to do so. The advances made prior to October, 1875, were carried to the husband's account. But we know that what was apparently the husband's was really the wife's. When the transfer of account was made, the balance standing to the credit

of the husband, which owed its existence to the advances, was carried to the credit of the wife; and so were subsequent advances. Mr. Fullarton then argued that she did not get the benefit of the advances if she was liable on the notes; but one who gives a promissory note does not fail to get the benefit of the money raised by it, because he must pay it when due. The arguments on this head are in substance an attempt to make out that the change in the form of accounts made in October, 1875, was really a change of the actual customer dealing with the bank; and they are inconsistent with the cardinal point affirmed by both Courts, namely, that throughout the whole transactions the husband was a name, and the wife the substantial party who was to have all profits and to bear all losses.

It may also be added that the silence of Madame Jodoin during the seven years of her widowhood raises a strong presumption that in her opinion she had suffered no wrong by the bank's dealing with her shares. It is suggested that she did not know of the purchase or transfer of the shares. That is a highly improbable suggestion; no evidence is adduced in favour of it; and certainly it ought not to be presumed against the bank, who are placed at a serious disadvantage by the delay. The only positive evidence on the point is that of Brais, who as cashier of the bank, and also as a relative of Madame Jodoin, had several conversations with her before and in the year 1879. He states that she well knew her liability on her husband's indorsements, and acquiesced in the transfer of her shares to reduce her debt to the bank in that year. The evidence of this witness, speaking as he does after Madame Jodoin's death, would be of little value if there were nothing else in the case; but it is admissible; it is the only evidence; it is in accordance with the probabilities arising from the proved dealings of the Jodoin family with one another; and it is not met by proof, or even by suggestion, of any new discoveries, made since the lady's death, by which the truth came to the knowledge of the plaintiffs.

The conclusion of their Lordships is that the plaintiffs' demand fails in justice and in law; and they will humbly advise Her Majesty to discharge the judgment of the Court of

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Queen's Bench, to dismiss the appeal to the Court of Queen's Bench with costs, and to restore the judgment of the Superior Court. The respondents must pay the costs of this appeal.

Solicitors for appellants: *Bompas, Bischoff, Dodgson, Coxe & Bompas.*

Solicitors for respondents: *J. & C. Robinson & Wilkins.*

[PRIVY COUNCIL.]

J. C.* 1895 *May* 7; *July* 10.

McSWAINE AND OTHERS . . . . . APPELLANTS;

AND

LASCELLES AND ADAIR . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

Law of Queensland—Religious Educational and Charitable Institutions Act of 1861, *s.* 3—*Validity of Charitable Gift—Effect of Incorporation.*

Where a bequest was made in favour of St. Paul's Church and its congregation, and it appeared that that congregation had voluntarily joined the Presbyterian Church of Queensland, an ecclesiastical body which had been incorporated through its officers under the Religious Educational and Charitable Institutions Act of 1861:—

Held, that the congregation, having regard to the terms of incorporation, had become, by virtue of their union, constituent members of the Church, so that a bequest in their favour was in reality a bequest to the incorporated body, and was accordingly invalidated, not having been registered or attested in the mode prescribed by the Act.

Sect. 3 of the Act applies to every gift which increases the resources of the incorporated body, although not in terms in its favour, and although trustees other than its own are selected as donees.

APPEAL from a decree of the Supreme Court (Dec. 14, 1893).

The question at issue, and the facts and proceedings out of which it arose, are stated in the judgment of their Lordships. Adair's will was dated in 1890, and the testator died in 1892.

Cozens-Hardy, Q.C., and *J. G. Wood*, for the appellants, contended that the testamentary disposition in question did not

* *Present*:—LORD HOBHOUSE, LORD MORRIS, LORD DAVEY, and SIR RICHARD COUCH.

come within sect. 3 of the Act of 1861, since it was not in favour of a corporation created by that statute. The Presbyterian church at Spring Hill, in whose favour the gift was made, was a voluntary association of individuals not constituting a corporation, or an integral part of a corporation, within the meaning of the Act. It had not by its officers or otherwise obtained the benefits of incorporation thereunder. The Act does not, on its true construction, enable the incorporation of any religious body either as a whole or in its integral parts. It only enables certain persons holding certain offices to become a corporate body for particular purposes. The letters patent which incorporated the Presbyterian Church of Queensland did not affect the status of the congregation at Spring Hill or its property, which congregation never obtained the benefits of incorporation. Reference was made to *Swan's Case* (1).

Sir *W. Phillimore*, Q.C., and *Mitchell*, for the respondent Adair, contended that the congregation at Spring Hill had so acted that it now formed part of the institution known as the Presbyterian Church of Queensland. It had thereby acquired all the benefits of the incorporation granted to the latter institution, or rather to its office-bearers. In consequence the bequest in question was practically to a corporation, whether to the Presbyterian Church of Queensland or to a body which was an integral part thereof, and which did not require any further letters patent to have the benefits of incorporation. Reference was made to *Edinburgh Presbytery* v. *De La Condamine* (2). [Lord Davey referred to *Dobie* v. *Temporalities Board* (3).]

Cozens-Hardy, Q.C., replied.

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The judgment of their Lordships was delivered by

Lord Davey :—

The question on this appeal is whether a charitable gift contained in the will of one Robert Adair is invalid by reason of the will not having been attested in the manner prescribed by the

(1) 4 Queensland L. J. 171. (2) 7 Court Sess. Cas. 3rd Series, 213.
(3) 7 App. Cas. 136.

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Religious Educational and Charitable Institutions Act of 1861, or registered as required by that Act. The testator directed the sale and conversion of his real and personal estate, and the gift in question is of the residue thereof, in these words: "To the Presbyterian Church at Spring Hill Brisbane aforesaid called St. Paul's now under the Pastorate of the Reverend J. F. McSwaine and I direct my said executor and trustee to pay and apply the same to and for the use and benefit of the said church as in his sole discretion shall seem fit or to pay the same to the churchwardens for the time being of such church and whose receipt shall be good and sufficient discharges to my said executor and trustee for any moneys he may pay them to be applied for the use and benefit of the said church as aforesaid."

Prior to and in the year 1863 a congregation of Presbyterians, calling themselves the Congregation of United Presbyterians, owned a church and lands situate in Creek Street, Brisbane, which were vested in trustees, in trust only for the use and behoof of the said Congregation of the United Presbyterian Church at Brisbane, then under the pastoral charge of the Rev. Mathew McGavin, and under the inspection of the United Presbyterian Synod, Scotland.

On the 25th of November, 1863, articles of union were adopted at an assembly or conference of delegates from Presbyterian congregations (not including the Creek Street congregation) held at Brisbane for the purpose of associating the Presbyterians of Queensland together by voluntary compact as an ecclesiastical body under the name of the Presbyterian Church of Queensland.

In or shortly after the year 1864 the Creek Street congregation voluntarily joined the said ecclesiastical body, and the members for the time being of the congregation thereupon became and have since continued to be a congregation of the Presbyterian Church of Queensland.

In the month of May, 1874, the General Assembly of the Presbyterian Church of Queensland adopted certain "rules and forms of procedure," which appear to their Lordships to have provided a regular ecclesiastical constitution for the Church according to the Presbyterian polity. Some of these rules and forms of procedure require to be referred to. The 1st article

restates the articles of union adopted by the Presbyterian Church of Queensland at its formation on the 25th of November, 1863, of which the 4th is in these words:—

"That the Church asserts to itself a separate and independent character and position, possesses supreme jurisdiction over its subordinate judicatories, congregations, and people; and will receive all ministers and preachers from other Presbyterian churches applying for admission, on an equal footing, who shall thereupon become subject to its authority alone." The general rules provide as follows: (4) "Every member of the Church has a right of access personally or by petition or complaint to the session of his own congregation, and through the session, by petition . . . . or appeal to the presbytery, and thence to the general assembly; and every inferior court, or member of any inferior court, has the right of access, in the same manner, to the next superior court, and upwards to the general assembly, on all matters concerning discipline, worship, doctrine, or government"; (20) "All members are held as subscribing to, and are bound by the articles of union and the formula of the Church, and have equal rights and privileges"; (25) "The temporal affairs of the congregation shall be managed by a deacons' court or committee of management"; and by rule 29 (2) one of the duties of the deacons' court is: "The management and charge of the whole property of the congregation"; (41) "The real property of the congregation shall be vested in trustees, who must be members of the congregation, and whose duties are defined in the schedule of trusts and the bond," forms of which are annexed; by rule 43 the presbytery are to select and appoint the trustees out of persons nominated by the congregation; rule 45 provides that "The real property of the congregation cannot be sold nor transferred without the consent of at least three-fourths of the members of the congregation, and also the consent of the presbytery of the bounds and of the general assembly." Provisions are also contained defining the constitution and functions of the session, the presbytery, and the general assembly.

The schedule of trusts and bond provide that the property affected thereby is to be held in trust for the particular congregation in connection with the Presbyterian Church of Queensland,

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and for the use of the congregation, "subject to the authority and jurisdiction of the Presbyterian Church of Queensland." And the trustees bind themselves faithfully to obey the decisions and orders of the courts of the said Church.

In the year 1885 the church and lands in Creek Street were sold, and partly out of the proceeds and partly out of other funds lands in Spring Hill were purchased, on which was erected the church now known as St. Paul's. There is no dispute that this church, and the congregation worshipping at this church, are the objects of the charitable bequest in question. The site of St. Paul's Church was vested in trustees, upon trust for the majority in number of the persons for the time being representing the congregation of St. Paul's Presbyterian Church, and upon certain further trusts mentioned in the deed.

Their Lordships will now refer to the Act of 1861, under which the present question arises. It is intituled "An Act to facilitate the incorporation of religious educational and charitable Institutions." After a preamble that "it is desirable to provide facilities for the transmission and management of estates properties and effects granted or dedicated to religious educational or charitable uses," by sect. 1 the governor is empowered to incorporate any person or persons, and their successors for ever, holding any religious or secular office or preferment, or exercising any religious or secular functions to which he or they shall have been duly called or appointed, in accordance with the rights, laws, rules, or usages of the community or institution to which such person or persons should belong, and such person or persons by their corporate name are empowered to hold to them and their suecessors to and for the uses and purposes of the corporation, and of the religious or secular institution by which such person or persons are called or appointed, real and personal estate. The 3rd section is in the following words:—

"Every deed of grant gift benefaction or testamentary disposition to or in favour of any such corporation shall be made in the presence of and attested by three credible witnesses and shall be executed and registered one month previous to the decease of the person making such deed of grant gift benefaction or testamentary disposition."

The office-bearers of the charitable community or institution are no doubt the corporators. But their Lordships think that they must consider them as incorporated only on behalf of the institution of which they are the officers, or, in other words, that the community or institution is incorporated through its officers. They also think that in construing the 3rd section they must hold every gift made for or in trust for all or any of the charitable and other objects or purposes of the institution as made to or in favour of the corporation within the meaning of that section, notwithstanding that the donor may have selected other trustees for the purpose of his bounty, and that the disposition is not directly or in terms to or in favour of the corporation. It appears to their Lordships that the section was so construed, and rightly construed, by the Supreme Court of Queensland in the case of Swan's will, to which they have been referred. To hold otherwise would unduly narrow, and indeed render almost nugatory, the enactment in the 3rd section of the Act. The effect of the Act therefore, in their Lordships' opinion, is to invalidate any disposition not attested or registered in accordance with the Act in favour of the community, the office-bearers of which are incorporated.

But it was contended before their Lordships that the congregation of St. Paul's was not incorporated under and had not taken the benefit of the Act, and that the gift to that body was not in any sense a gift to or in favour of the corporation called the Presbyterian Church of Queensland, and was therefore not within the Act. Their Lordships think that this ground cannot be maintained consistently with the constitution established in May, 1874. In their opinion, the persons forming the church or congregation of St. Paul's became and were at the date of the bequest constituent members of the Presbyterian Church of Queensland, and as such were entitled to the benefit of the incorporation granted by the letters patent to that Church, and the facilities thereby acquired for the transmission of their property. It was argued that the members of the congregation might secede from the Church; but it is another question whether property given to or held in trust for the congregation, being members of the organized ecclesiastical body called the

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Presbyterian Church of Queensland, could be diverted by the seceders to uses unconnected with that institution. It is unnecessary, however, to express any opinion upon this, because at the date of the bequest the congregation were still members of the Church, and held their property subject to the provisions and conditions contained in the rules of that Church. The property clauses of the Rules and Forms of Procedure of 1874 are such as to create common interests in property between the Church and the congregation. Rule 29 (2) must clearly be taken with much qualification. As regards real property, the presbytery select its trustees. It cannot be sold without the assent of the presbytery of the bounds and of the general assembly. And the trustees are bound to hold it in trust for the congregation in connection with the Church, and subject to authority of the Church courts.

Such provisions shew that the union is not one of faith, sympathy, and co-operation alone, but of property also. As regards the most important and permanent class of property, namely, real property, the union is express and direct: a gift of land to the congregation is, by virtue of their contract, a gift in favour of the church; the Act makes no distinction between the two kinds of property; it applies to every gift to or in favour of the incorporated body. In the view of their Lordships every gift to the congregation tends to increase the resources of the Church, and is in furtherance of the objects, uses, or purposes for which the office-bearers of the Church were incorporated. Their Lordships are of opinion that the gift in question is one in favour of the incorporated body within the meaning of the Act.

Their Lordships, therefore, agree with the judgment of the Supreme Court, and will humbly advise Her Majesty that the same be affirmed. They were informed at the bar that an arrangement was made in the colony that the costs of all parties of this appeal as between solicitor and client should in any event be paid out of the estate. Their Lordships will direct accordingly.

Solicitors for appellants: *Flower, Nussey & Fellowes.*

Solicitors for the respondent Adair: *Blyth, Dutton, Hartley & Blyth.*

[PRIVY COUNCIL.]

W. MORRIS . . . . . APPELLANT; J. C.* 1895 May 9; July 3.

AND

A. MORRIS, OFFICIAL ASSIGNEE OF THE ESTATE OF S. W. COOK . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Bill of Sale of all the Debtor's Property—Delay in Possession and Registration—Validity of Bill of Sale—Bankruptcy Act, 1887 (51 *Vict. No.* 19), *ss.* 4, 52.

Where the appellant advanced money in good faith to a person who appeared to be solvent, taking a bill of sale which included all the debtor's stock in trade, book debts, and other property, but without taking delivery or registering the bill of sale until just in time to prevent its being avoided under the Bills of Sale Act:—

Held, that his title thereunder prevailed against the debtor's official assignee, no intent being shewn to have existed at the date thereof to defeat or delay creditors.

APPEAL from an order (Nov. 1, 1893) of the Supreme Court (in bankruptcy) reversing an order of the Chief Judge in Equity sitting as judge in bankruptcy (April 24, 1893).

The respondent had moved for an order declaring void a bill of sale and a mortgage executed by the bankrupt in favour of the appellant. He relied on sects. 58 and 4 of the Bankruptcy Act, 1887, and 13 Eliz. c. 5.

Owen J. found that the advance in respect of which the documents had been executed was a bonâ fide advance; that there was no evidence that the bankrupt was at the date thereof in any financial difficulties, or, if he was, that the appellant was aware of his position; that the desire that the bill of sale should not be registered came from the appellant, and that there was no intention on the part of the appellant to defeat or delay the bankrupt's creditors.

The Supreme Court in appeal held that the execution of the bill of sale and mortgage constituted an act of bankruptcy, as

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being a conveyance of all the debtor's property with intent to defeat and delay his creditors. The Chief Justice said:—

"The Court did not differ from his Honour as to the facts, but as to the inference he drew from those facts. His Honour thought that there was this arrangement on Dr. Morris's part to keep the bill of sale secret, and on the bankrupt's part to give timely notice of impending insolvency, but his Honour thought that such an arrangement did not shew an intent on the part of the bankrupt to defeat or delay his creditors. I am of the contrary opinion, that such an arrangement is the strongest evidence of such an intent. The result of such an arrangement is that the bankrupt's credit is sustained, he is enabled to contract debts and incur liabilities, and his creditors are deceived or lulled into a false security, and were such an arrangement to be maintained they would be defeated and delayed in a fraudulent manner."

Warmington, Q.C., and *F. Thompson*, for the appellant, contended that in order to make the transaction in question an act of bankruptcy under sect. 4 of the Bankruptcy Act, 1887 (51 Vict. No. 19), and to avoid it under sect. 58, it must be shewn to have been executed with an intent at the time of execution to defeat or delay creditors. It was not void under 13 Eliz. c. 5. The non-delivery and non-registration at the same time as the execution did not avoid it, for they were neither of them essential in law to its validity. The evidence shewed that the sole intent of the parties was to give and take security for a loan. The appellant postponed delivery and registration at his own risk, and his doing so did not affect the legality of the transaction. The transaction, being valid, was not subsequently avoided by delay in registering and taking delivery, for such delay was not forbidden by any statute. Reference was made to *In re Colemere* (1), *Administrator of Jamaica* v. *Lascelles* (2), and the cases there cited: *Ex parte King* (3); *Ex parte Johnson* (4).

Reed, Q.C., and *Carrington*, for the respondent, contended that

(1) L. R. 1 Ch. 128.
(2) [1894] A. C. 135.
(3) 2 Ch. D. 256.
(4) 26 Ch. D. 338.

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upon the evidence it was proved that the transaction was calculated and intended to, and did, defeat and delay the bankrupt's creditors. Further, the registration and delivery were postponed by agreement. The bankrupt undertook to warn the appellant when things were not bright and so enable him to complete the validity of the assignment. But in the meantime the bankrupt was enabled to induce creditors to trust him, believing him to be the owner of the effects comprised in the bill of sale. It must have been obvious to and intended by both the parties that such would be the effect. The same parties who by their delay induced the creditors to trust, defeated those creditors by their subsequent seizure of the goods under their bill of sale. The necessary effect of the transaction was to defeat creditors. Accordingly, it was right to hold that such effect was within the contemplation and intention of the parties. Reference was made to the Bankruptcy Act (51 Vict. c. No. 19), s. 56, sub-s. 1; *Ex parte Boon* (1); *Ex parte Fisher* (2); *Graham* v. *Chapman* (3).

Thompson, replied, referring to *Ex parte Kilner* (4), as explaining *Ex parte Fisher* (2).

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July 3.

The judgment of their Lordships was delivered by

THE LORD CHANCELLOR:—

This is an appeal from an order of the Supreme Court of New South Wales reversing an order of Owen J., sitting as a judge in bankruptcy, who refused to declare a bill of sale given by the bankrupt to the appellant on the 11th of July, 1892, void as against the official assignee of the bankrupt.

The assignment included all the stock-in-trade, book debts, and other property of the bankrupt. It appears that he was indebted in a sum of £500 to a Mr. Warner, who required payment. The bankrupt accordingly sought, through the agency of a Mr. Tomkins, to obtain a loan for the purpose of enabling him to discharge this debt, and of providing him with further

(1) 41 L. T. 42.
(2) L. R. 7 Ch. 636.
(3) 21 L. J. (C.P.) 173; S.C. 12 C. B. 85.
(4) 13 Ch. D. 245.

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funds. Tomkins applied to the appellant to make the advance. He promised to lend £600 upon obtaining as security a bill of sale. While the negotiations were proceeding, the appellant was under the impression that the proposed borrower was a brother of the bankrupt. Upon his discovering that this was not the case, he at first refused to make the loan, but ultimately agreed to do so, and a bill of sale was executed and the money advanced on the 11th of July, 1892.

Owen J., who heard the case, states in his judgment (as their Lordships think with perfect correctness) that there was no evidence that the bankrupt was at that time in any financial difficulties. The case then stands thus: The appellant made the advance of £600 in good faith, as the judge found, to a man who, as far as appears, was solvent, taking as security the assignment in question of which he is primâ facie entitled to the benefit. It is asserted, however, that the assignment was made with intent to defeat or delay creditors within the meaning either of the Act 13 Eliz. c. 5, or of the Bankruptcy Act then in force, and is therefore void as against the respondent. The bill of sale was not registered, and possession was not taken by the appellant until immediately before the bankruptcy, but it was taken in time to prevent the instrument being avoided under the provisions of the Bills of Sale Act.

It was incumbent, therefore, on the respondent to prove the intent, which he alleges, to defeat or delay the creditors of the bankrupt. For this purpose he relies on what passed with reference to the registration of the bill of sale at the time the transaction was entered into. There is some conflict of evidence as to this. The appellant asserts that it was he who insisted that the bill of sale should not be registered, on the ground, that as he was a medical man and not a money-lender he did not, wish his name to appear in connection with a loan upon the trade register. His evidence is confirmed in this respect by Tomkins.

In a prior deposition in bankruptcy the appellant said, "It was arranged that the bill of sale was not to be registered. I agreed to this." There appears to be no inconsistency between this statement and his evidence at the hearing.

The bankrupt in his evidence did not contradict the appellant's statement that the idea of non-registration emanated from him, though on his examination in bankruptcy he had said that he thought he asked the appellant not to register the bill of sale as it would injure his credit. The appellant denied this, and the learned judge in whose presence the witnesses were examined believed this denial, and said that no one who heard the bankrupt give his evidence could doubt that he was an unreliable witness.

Their Lordships, therefore, can have no hesitation in accepting the appellant's account of what had happened. They entertain no doubt that the sole reason why the appellant did not register the bill of sale was that which he gave, and that there was no agreement that he should refrain from registering it at the instance, and for the benefit, of the bankrupt.

The respondent, however, further relies upon the alleged agreement by the bankrupt to inform the appellant if "things were not looking so bright," so that he could either register the bill of sale or take possession under it. The learned judge says: "The respondent" (the present appellant) "at first denied this, then he said he did not remember, and finally he volunteered the statement that he would not undertake to say that the words were not used. I must, therefore, take it that those words may have been used; but even so it does not shew an intent on the respondent's part to defeat or delay his creditors."

In view of the fact that the learned judge treated the appellant as a witness of truth, and characterized the bankrupt as an unreliable witness, it may well be doubted whether, if it were material, any finding adverse to the appellant could properly be based upon this evidence of the bankrupt, even though the appellant would not undertake absolutely to contradict it. But their Lordships entirely agree with the learned judge of first instance that even if the bankrupt volunteered, as he alleges he did, to give the appellant information if his circumstances should become precarious, it does not assist the respondent's case.

The question is, with what intent the assignment was made, and not why the appellant refrained from registering or postponed taking possession. Their Lordships see no evidence

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that the assignment was made with intent to defeat or delay creditors. They think the transaction was a perfectly honest and straightforward one. The intent of the bankrupt who made the bill of sale was to obtain an advance of £600, which he could not get except upon the terms of his giving that security. The intent of the appellant who made the advance was to obtain security for his loan. Their Lordships do not believe that there was on the part of either of them any other intent.

It was suggested for the respondent that as the appellant knew that Warner, who was unsecured, was to be repaid out of the advance of £600, it was really a device for transferring Warner's debt to the appellant, and so giving a security for it which could not safely have been given to Warner in respect of an antecedent debt due to him. There appears to their Lordships to be no pretence for this suggestion. If the assignment was not vitiated by any such intent as is alleged, it is immaterial to inquire why the appellant refrained from registering or postponed taking possession. He was under no legal obligation to do either. No doubt unless he registered or took possession he incurred the risk of losing his security. So long as he did neither, his security would have been avoided by an execution or a bankruptcy. But he was entitled to run this risk if he pleased. Subject to this risk, the law in England as well as in New South Wales allows a title to be acquired by an assignment without delivery of possession.

This is, in their Lordships' opinion, the answer to the reasons which appear to have mainly influenced the Supreme Court. It is quite true that credit may probably have been given to the bankrupt after the date of the bill of sale which he would not have obtained if that transaction had been made public either by registration or a change of possession. But when the Legislature determined to interfere with secret bills of sale they did not render all assignments void unless accompanied by delivery or followed by registration. The operation of the Bills of Sale Act was much more limited.

The learned Chief Justice in the Supreme Court relied much on the case of *Ex parte Fisher* (1). In that case a bill of sale was

(1) L. R. 7 Ch. 636.

given in respect of an antecedent debt, and at a time when the grantor was in a condition of insolvency. It was, therefore, primâ facie bad. It was sought to validate it upon the ground that the advance had been made on a promise that a bill of sale should be given, and that the sum advanced was, therefore, to be treated as a present advance on the security of that instrument. The Court, whilst admitting that as a general rule this would be so, thought that the rule did not protect transactions where the giving of a bill of sale was purposely postponed until the trader was in a state of insolvency in order to prevent the destruction of his credit which would result from registering a bill of sale.

The Chief Justice said in his judgment in the present case that "there was a close analogy between the case of postponing the giving of a bill of sale and postponement in entering into possession." Their Lordships cannot agree with this view. In the case relied on the bill of sale was given by an insolvent person without any present advance, and of itself could not avail the grantee. He invoked the aid of a prior promise made at the time of the advance; but, for the reasons given, the Court held that he could not derive any benefit from this promise.

In the case under appeal the bill of sale was granted, in respect of a present advance, by a person not shewn to be insolvent. The title of the grantee was then complete, and did not depend upon his taking possession, though, owing to his not doing so, the provisions of the Bills of Sale Act might in certain events have deprived him of his security. Beyond this his title was unaffected by it.

Their Lordships will humbly advise Her Majesty that the judgment appealed from should be reversed and the order of the judge in bankruptcy restored, and that the respondent should pay the costs in the Supreme Court and the costs of this appeal.

Solicitors for appellant: *Field, Roscoe & Co.*
Solicitors for respondent: *Lumley & Lumley.*

[PRIVY COUNCIL.]

J. C.* 1895 *May* 16, 17; *June* 29.

BRABANT & CO. . . . . PLAINTIFFS;

AND

THOMAS MULHALL KING . . . . . DEFENDANT.

AND CROSS APPEAL.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

Liability of Government as compulsory Bailees for Hire—Negligence of Bailee—Volenti non fit injuria—Queensland Navigation Act, 1876 (41 *Vict. No.* 3)—*Queensland Customs Act*, 1873 (37 *Vict. No.* 1), *s.* 103.

Where the Government, being bailees for hire, stored the appellants' explosive goods in sheds near to the water-edge:—

Held, that the selection of such a site rendered it incumbent upon them to place the goods at such a level as would in all probability ensure their absolute immunity from the incursion of flood water; that the appellants were entitled to rely on the care and skill of their bailees, and could not be said to have accepted any risks of defective storage with which they had made themselves acquainted.

Case remanded for a new trial, to ascertain whether the Government negligently stored the goods at too low a level, or whether, on the advent of the floods, they failed to take reasonable and proper measures for saving the goods, or part thereof.

Decisions that public bodies are not liable to individuals for nonfeasance have no application where the public body is under contract with the individual for remuneration.

CONSOLIDATED APPEALS from an order of the Supreme Court (July 20, 1894), setting aside the verdict and judgment entered on the trial of the appellants' action against the respondent, and directing a new trial to re-assess damages.

The facts and proceedings are stated in the judgment of their Lordships.

The action was brought against the respondent, who was appointed by the Government as a nominal defendant, under the Claims against Government Act (29 Vict. No. 23), to

* *Present*:—THE LORD CHANCELLOR, LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, LORD SHAND, LORD DAVEY, and SIR RICHARD COUCH.

recover £8000 damages for the loss and destruction of certain cases of dynamite and other explosive goods which had been stored in the Government storehouses at Brisbane.

The verdict was for £7680. The Supreme Court by a majority held that the Government were liable for negligence in the manner in which the explosives were dealt with, but that they were not liable for damage caused by any unsuitability in the magazines, as this was known to the plaintiffs and their servants, and that the maxim "Volenti non fit injuria" applied. They directed the damages to be re-assessed at a new trial, on the ground that there was no evidence to support the finding that the Government could by the exercise of any ordinary care have done more than save a portion of the explosives.

Sir *Richard Webster*, Q.C., *Vernon Smith*, Q.C., and *Bankes*, for the appellants, contended that the judgment of the Supreme Court, so far as it held the appellants disentitled to recover the full amount of their claim, should be reversed. The verdict was fully warranted by the evidence. The appellants were compelled to use the Government magazines: see Navigation Act, 1876 (41 Vict. No. 3), the Port Dues Revision Act, 1882 (46 Vict. No. 12), the Customs Act of 1873 (37 Vict. No. 1). The particular magazine in which they were compelled to store their goods was unsuitable, being situate in a locality exposed to floods; its floor had not been properly raised so as to leave a sufficient margin for safety; and the goods were not removed or re-stacked when floods were anticipated or had occurred. The Government accepted the goods as bailees for hire, and were bound to take all necessary precautions at their own risk, and to indemnify the appellants against loss resulting from negligent storage. There was no evidence that the appellants knowingly and voluntarily accepted the risk of unsuitable storehouses or of their unsuitable internal arrangements. Clear evidence to that effect ought to have been given in regard to those who compulsorily stored their goods there in order to let in the maxim of "Volenti non fit injuria"; even if a person acting under the vis major of an Act of Parliament could be said to be volens. Reference was made to *Woodley* v. *Metropolitan District Railway*

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Company (1); *Lax* v. *Mayor, &c., of Darlington* (2); *Thomas* v. *Quartermaine* (3); *Yarmouth* v. *France* (4); *Osborne* v. *London and North Western Railway Company* (5); *Membery* v. *Great Western Railway Company* (6); *Smith* v. *Baker* (7).

Finlay, Q.C., and *Bray*, for the respondent, contended that the order of the Supreme Court was right so far as it set aside the judgment entered for the appellants, but that it should have gone further and directed judgment for the respondent. The Government were under no liability to the appellants in respect of explosives stored under the Act of 1876 in respect either of the character of the magazine or of the manner in which the explosives in the magazine were dealt with: see Queensland Customs Act of 1873 (37 Vict. No. 1), s. 103. It could not be said that the Government were in the ordinary position of bailees for hire. There was no evidence on which, assuming the liability of the Government, the jury could have found that the magazines in question were unfit for the purpose of storing explosives as regards their construction or locality; and none on which they could find that the mode of storing therein was negligent or improper, or that there was negligence in not removing or re-stacking the goods. Reference was made to *Farnell* v. *Bowman* (8), and to *Feather* v. *Queen* (9).

Vernon Smith, Q.C., replied.

1895 *June* 29.

The judgment of their Lordships was delivered by

LORD WATSON:—

The Queensland Navigation Act of 1876 (41 Vict. No. 3) requires that the master of every vessel arriving at a port in that colony shall land, at the Government or other authorized store, all gunpowder exceeding twenty pounds in weight, and all other explosive substances which may be on board such vessel whether as cargo or stores. On the passing of the Act, the

(1) 2 Ex. D. 384.
(2) 5 Ex. D. 28.
(3) 18 Q. B. D. 685.
(4) 19 Q. B. D. 647.
(5) 21 Q. B. D. 220, 224.
(6) 14 App. Cas. 179.
(7) [1891] A. C. 325.
(8) 12 App. Cas. 643.
(9) 6 B. & S. 257.

Government of the colony established magazines at the port of Brisbane for the reception of explosives, and no other magazines have been authorized or erected there. These magazines are under the exclusive charge of Government officials, and storage rent is payable to them for all explosives deposited with them. In the event of such rent not being duly paid within a time limited, the officer in charge is authorized by the Act to sell the explosives, and with the proceeds of sale to satisfy the rent, and all other charges and expenses, accounting for the surplus, if any, to the importer or owner of the goods. Sect. 103 of the Queensland Customs Act of 1873 (37 Vict. No. 1) provides "that no compensation shall be made by the Government or the collector to any importer proprietor or consignee of any goods by reason of any damage or loss occasioned thereto in the warehouse or in any examining shed by fire or inevitable accident or by felony."

Before the month of January, 1893, the appellant company had, in compliance with the Act of 1876, landed at the port of Brisbane 616 boxes of dynamite, 568 boxes of gelignite, 361 boxes of gelatine dynamite, and 33 cases of detonators. These goods remained in the Government stores until the month of February, 1893, when the events occurred which have given rise to the present litigation. The boxes of dynamite and other explosive substances were all stored in a wooden magazine which had been previously used as a coal-shed, at Eagle Farm, below Brisbane, about twenty feet from the bank of the river. The cases of detonators were stored in a paraffin-oil shed a little way farther up the river.

On two occasions in the month of February, 1893, the River Brisbane was in heavy flood, and its waters rose to an exceptional height. On the first occasion the flood attained its maximum in the afternoon of Sunday, the 5th of February, when the water rose to a point 4 ft. 7 in. above the floor of the Eagle Farm magazine. On the second occasion, the flood water, in the morning of Sunday, the 19th of February, rose 9 in. higher, or 5 ft. 4 in. above the floor of the magazine. The result was that the whole of the appellant company's goods were rendered valueless by their immersion in water.

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The present proceedings were brought by the appellant company in January, 1894, for recovery of the damage which they had sustained in pursuance of the Claims against Government Act; and the respondent, Thomas Mulhall King, was duly appointed to be nominal defendant on behalf of the Government of the colony. Shortly stated, the case made in their pleadings by the appellant company was, that the Government officials had failed to take reasonable precautions against the occurrence of floods, by storing their goods at a higher level, and had also failed, when the floods came, to take reasonable and proper measures for preventing or diminishing damage by shifting some of the cases and stacking them above the others. The respondent, besides traversing these allegations, maintained that the appellant company had accepted the risk of the condition in which the premises were, and of the locality in which they were situated at the time of storage, and also that the rapid rising of the Brisbane River to an unprecedented height, on the two occasions referred to, was an "inevitable accident," for which the Government were not responsible.

The case was tried before Harding J. and a jury, whose verdict consisted of separate answers to the following nineteen questions which were submitted to them by the learned judge:—

1. Before January, 1893, were the plaintiffs importers into the port of Brisbane of the goods?—Yes.

2. Before said date did plaintiffs deliver goods to Government in pursuance of statutes to be taken care of for reward?—Yes.

3. In consideration thereof did Government undertake and agree with plaintiffs to (*a*) properly store and take care of goods, and (*b*) to deliver to plaintiffs on request?—(*a*) (*b*) Yes.

4. Before said date did Nobel's Company cause to be delivered by plaintiffs the goods to Government in pursuance of statutes to be stored and taken care of for reward?—Yes.

5. Were plaintiffs the duly constituted agents of company in that behalf?—Yes.

6. In consideration thereof did Government undertake and agree with company to (*a*) properly store and take care of goods, (*b*) redeliver to company on order or request?—(*a*) (*b*) Yes.

7. Did the Government not regard its duty in that behalf?—They (1) did not.

8. Did it not take proper care of the goods?—They (1) did not.

9. By its negligence in not providing (*a*) proper storehouses, (*b*) a proper locality, (*c*) in not taking proper care, were the goods after that date destroyed?—(*a*) (*b*) (*c*) Yes.

10. Is the indenture of the 6th of November, 1893, proved?—Yes.

11. If loss arose was it caused by inevitable accident through the rapid rising to an unprecedented height of the flood?—No.

12. Was such rising such that the Government could not by any amount of ability have foreseen or guarded against it?—The rising was not such that the Government could not by any amount of ability have foreseen or guarded against it.

13. Was it known at all times to plaintiffs (*a*) that such storehouses, (*b*) that such locality were unfit or improper?—Yes.

14. Did plaintiffs with full knowledge of question 13, and of the risks attending the storage of explosives in such locality, for many years prior and up to grievance continue to deliver explosives to the Government for storage by them in the said storehouse and locality?—Yes.

15. Did plaintiffs undertake and continue to undertake such risks?—Yes.

16. Thereafter and with full knowledge of questions 13, 14, 15, did plaintiffs deliver the explosives to Government for storage in its storehouses in locality?—Yes.

17. What was the value of goods destroyed?—£7680 8*s.* 4*d.*

18. Was that the market value? If not, what was?—Yes.

19. What damages?—£7680 8*s.* 4*d.*

Upon these findings the learned judge directed judgment to be entered for the plaintiffs for the full amount found by the jury.

Against that judgment the present respondent appealed, and gave notice of motion, (1.) to have the judgment set aside, and to have judgment entered for him upon the findings as they stood; or (2.) to have the judgment set aside and judgment of non-suit entered; or (3.) to have the findings of the jury in

(1) *Sic.*

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answer to questions 7, 8, 9, 11, 12, 17, 18, and 19 set aside, and a new trial had; or (4.) to have the findings of the jury in answer to questions 17, 18, and 19 set aside, and the amount of damages re-assessed. The appellant company lodged a counter-motion to have the findings of the jury in answer to questions 13, 14, 15, and 16 set aside.

The appeal and cross-motion were heard before three judges of the Supreme Court, who, by a majority, ordered that the judgment entered be set aside; that the findings of the jury in answer to questions 9 (*a*) (*b*), 17, 18, and 19 be set aside, and that a new trial be had between the parties to re-assess the damage. The appellant company were ordered to pay to the respondent his costs of the appeal, the payment of costs of the trial and of all other costs being reserved. The effect of that order was in substance to strike out of the verdict one finding of the jury which affirmed that the Government had been negligent in not providing a proper storehouse in a proper locality, and in not taking proper care of the goods, and also the three findings relating to the amount of damages.

Cooper J., the dissentient judge, thought that judgment ought at once to be entered for the defendant, being of opinion that the Government was under no liability to the appellant company upon the principle recognised by this board in *Sanitary Commissioners of Gibraltar* v. *Orfila* (1), and more recently in *Municipality of Pictou* v. *Geldert* (2), and in *Municipal Council of Sydney* v. *Bourke* (3). That principle has, in many instances, been held to afford protection to commissioners or trustees representing public interests from the consequences of mere nonfeasance; but it has, in the opinion of their Lordships, no application to a case like the present, in which the parties charged with nonfeasance are under obligation to an individual member of the public to perform the duty which they have neglected to his prejudice, in consideration of their being remunerated by him for its performance.

In delivering judgment, the majority of the Court, consisting of Chubb and Real JJ., mainly directed their observations, in

(1) 15 App. Cas. 400. (2) [1893] A. C. 524.
(3) Ante, p. 433.

the first place, to the answer returned by the jury to question 9 (*a*), (*b*), (*c*), and, in the second place, to the answer given to question 16. They differed from the learned judge who tried the case, as to the proper legal inference to be derived from the findings implied in the answer given to question 16, taken in connection with the answers of the jury to the three preceding questions. They held that these findings necessitated the conclusion in law that the appellant company had accepted the burden of all risks, so far as arising from the condition in which the Government storehouses were at the time when their goods were landed, and from the locality in which these storehouses were situated. It is obvious that, if the appellant company had agreed to undertake such risk, the Government would have been, to that extent, relieved of the duty of taking precautions for the safe custody of the goods. Accordingly, when the learned judges of the majority came to deal with the findings of the jury in answer to (*a*) and (*b*) of question 9, which affirm respectively the negligence of the Government in not providing proper storehouses, and in not placing these in a proper locality, they held that the findings were in direct conflict with the answer given by the jury to question 16. Both of the learned judges indicated their opinion that the answer to (*c*), the third branch of question 9, which affirms, in general terms, that the goods perished through neglect of the Government to take proper care of them, might cover the failure of their officials to take proper measures, when the floods came or were imminent, to prevent loss by re-stacking the boxes. And they held that, while the appellant company were precluded from charging the Government with negligence in respect of any alleged failure to alter the condition or site of the storehouses before the advent of the floods of February, 1893, it was still open to them to shew that proper precautions had not thereafter been taken for the purpose of salving part at least of the goods stored, and to recover damages for the goods destroyed through the want of these precautions.

When the judgment of the Supreme Court is read, in the light of the opinions expressed by the majority, it becomes clear that the sole object of the Court in remitting the case for new

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trial was to give the appellant company an opportunity of satisfying a jury that, on the arrival of the floods in question, the Government officials failed to adopt reasonable and proper means to place part, if not the whole of their goods, beyond the reach of flood-water; and, in the event of the jury finding to that effect, to have the amount of damage resulting from such failure assessed by them. Both parties have appealed against the judgment, the original appeal being at the instance of the appellant company, and the cross-appeal, which has been consolidated with it, at the instance of the respondent as representing the Government of the colony. The arguments addressed to their Lordships have been on the same lines with those indicated by the parties in their motions before the Supreme Court, which have already been noticed.

The real issues involved in the pleadings of the parties, and in the evidence which was led by them before the jury, appear to their Lordships to be exceedingly simple; although they were complicated, if not obscured, by the pleas of inevitable accident, and of acceptance of risk by the company, which were advanced by the respondent, as well as by the shape in which the case for the appellant company was presented for the consideration of the jury.

Their Lordships can see no reason to doubt that the relation in which the Government stood to the appellant company was simply that of bailees for hire. They were therefore under a legal obligation to exercise the same degree of care, towards the preservation of the goods entrusted to them from injury, which might reasonably be expected from a skilled storekeeper, acquainted with the risks to be apprehended either from the character of the storehouse itself or of its locality; and that obligation included, not only the duty of taking all reasonable precautions to obviate these risks, but the duty of taking all proper measures for the protection of the goods when such risks were imminent or had actually occurred.

Their Lordships think it right to indicate that, in their opinion, the locality of the Government stores to which the present case relates was not a matter of which reasonable complaint could be made, and that it bulked too largely in some of the questions

put to the jury. It is not only convenient, but it may be highly expedient, that stores for the reception of explosive substances landed from vessels before they enter the harbour should be placed near to the water-edge. But the selection of such a site, however justifiable in itself, imposes upon the storekeeper the plain duty of making arrangements within the store by which the goods are placed at such a level as will, in all probability, ensure their absolute immunity from the incursion of flood-water.

Upon the respondent's plea of inevitable accident, their Lordships have only this observation to make, that it does not appear to them to be appropriate to the circumstances of the present case; and that, when stated in the form in which it was submitted to the jury by questions 11 and 12, it does not afford the true test for determining the liability or non-liability of the Government.

It admits of serious doubt whether questions 13, 14, 15, and 16, upon the answers to which the decision of the Supreme Court is based, ought to have been sent to the jury. The answer returned to question 15 does not deal with fact; it is in reality an inference in law from the facts affirmed by the other replies to these questions; and it was, in their Lordships' opinion rightly, disregarded by Harding J. when he proceeded to apply the verdict. It would be very dangerous doctrine, for which there is not a vestige of authority, to hold that a depositor of goods for safe custody, who, by himself or his servants, has had an opportunity of observing certain defects in the storehouse, must be taken to have agreed that any risk of injury to his goods which might possibly be occasioned by these defects should be borne by him, and not by his paid bailee. The authorities relating to the vexed maxim "Volenti non fit injuria" have no bearing whatever upon the point. From the very nature of the transaction the depositor is entitled to rely upon the care and skill of his bailee. The duty is incumbent upon the latter, in the due fulfilment of his contract, of considering whether his premises can be safely used for the storage of explosives or other goods, and, if they cannot, to take immediate steps for placing the goods in a position of safety. If the defects of these

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Government magazines were as apparent to the servants of the appellant company as the jury have found they were, they ought to have been equally patent to the official storekeeper, with whom the duty of safe custody rested.

Their Lordships are accordingly of opinion that the judgment of the Supreme Court must be set aside; and they have come, not without regret, to the conclusion that no course is open to them for terminating the litigation except sending back the case for new trial. Besides the assessment of damages, if any are found to be due, there are, in their opinion, only two questions which, in some shape or other, ought to be submitted to the jury. The first of these questions is, whether the Government officials failed to exercise due care and skill, in storing the appellant company's goods, seeing that they stored them at so low a level that they were destroyed by the floods of February, 1893; and the second, whether on the advent of the floods these officials failed to take reasonable and proper measures for saving the whole or any, and if so what part, of the goods from destruction. These issues are, in this sense, alternative, that, in the event of the jury affirming the first, it will be unnecessary for them to take the second into consideration.

Seeing that there must be a new trial, it is unfortunate that an opinion should have been expressed by one of the learned judges of the majority of the Supreme Court tending to the inference that the first of these issues is only susceptible of one answer. Chubb J. said: "I see nothing in the evidence to shew that the abnormal flood of 1893 could have been or was foreseen by anybody." In the view of the case which was taken by the learned judge those observations might be legitimate, and it is obvious that they were not meant to trench upon the province of the jury at the second trial. Real J., with commendable caution, observed that he felt "bound to hold that the evidence given entitled the jury to find that a reasonable man ought to have anticipated a flood higher than that of 1890, and as high as that of 1893; ought to have known that goods placed in a magazine or store at a height less than the level of the floods of 1893 were in danger of being injured by flood waters." The evidence, shortly stated, shews that about the year 1886 there

was a flood higher than any of its predecessors; that, in 1890, there was another flood still higher; and that, after its occurrence, the platform upon which explosives were stored was raised by about an inch. Whether, in view of the possibility of natural causes, and of the probability of artificial causes tending to raise still higher the level of the river floods, an increase in the elevation of the platform to that limited extent was consistent with either skill or prudence, appears to their Lordships to be a substantial question, well fitted for the consideration of a jury.

Their Lordships will humbly advise Her Majesty to reverse the judgment of the Supreme Court, except in so far as it directs that the judgment entered for the plaintiffs be set aside; to set aside the findings of the jury in answer to questions 7 to 19 inclusive submitted to them at the trial; to direct that a new trial be had; and to reserve for the decision of the judge who tries the cause all questions of costs incurred in both Courts below, until the result of such new trial. The respondent must pay to the appellant firm their costs of these appeals.

Solicitors for the appellants: *Bircham & Co.*
Solicitors for the respondent: *Freshfields & Williams.*

[PRIVY COUNCIL.]

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May 21, 22, 24, 28; *July* 3.

THE IMPERIAL JAPANESE GOVERNMENT . . . . . } PLAINTIFF;

AND

PENINSULAR AND ORIENTAL STEAM NAVIGATION COMPANY . . . . . } DEFENDANTS.

ON APPEAL FROM THE SUPREME COURT FOR CHINA AND JAPAN AT SHANGHAI (IN ADMIRALTY).

Jurisdiction of Consular Courts in Japan—Counter-claim against Japanese Plaintiff—Jurisdiction of Consular and Territorial Courts under International Treaties.

By virtue of treaties between Great Britain and Japan the Consular Courts of the former country and the territorial Courts of the latter country have exclusive jurisdiction over claims against British and Japanese subjects respectively.

Accordingly, it would be in excess of the jurisdiction granted to the British Consular Court if it were to entertain by way of counter-claim or cross-action a claim by a British defendant against a Japanese plaintiff. The cognizance of such claim belongs to the territorial Courts.

The respondent company, being sued by the Emperor of Japan in a British Court for damages resulting from a maritime collision, counter-claimed in respect of the same collision as due to the negligence of the plaintiff's servants:—

Held, that the counter-claim could not be entertained.

APPEAL from an order of the Supreme Court (Nov. 25, 1893) varying an order of Her Britannic Majesty's Court for Japan in Admiralty (June 29, 1893), and giving leave to the respondents to file a counter-claim by cross-petition in the appellants' suit, which was brought to recover damages for a maritime collision under the circumstances stated in the judgment of their Lordships.

The collision occurred in Gogo Shima Straits at a part where

* *Present:*—THE LORD CHANCELLOR (LORD HERSCHELL), LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, LORD SHAND, LORD DAVEY, and SIR RICHARD COUCH.

they are about two miles wide, between the Japanese islands of Musuki and Gogo, and the straits in question form part of what is commonly called or known as the "Inland Sea" of Japan, and is about 240 miles long from east to west. There are four entrances from the ocean to that "Inland Sea," two being very narrow, the third under two miles wide, and the fourth having two branches, the widest being about four miles wide. In this "Inland Sea" are several islands, that of Gogo above mentioned being near the northern shore of Shikoku, which is one of the four large islands of Japan, and forms the southern boundary of the eastern portion of the said "Inland Sea," the place where the collision happened being within three miles from the nearest part of Shikoku.

The first Court refused leave on the ground that the place where the collision occurred was within the Empire of Japan, that accordingly the law of Japan was to be applied to the collision, and that as by that law the Emperor was not liable for the negligent acts of his servants, he could not be sued in a British Court for damages resulting therefrom.

The Supreme Court found that the right of vessels of other nations than Japan to enter into and pass through or navigate the "Inland Sea" had been asserted by England, France, Holland, and the United States, and admitted by the Government of Japan; that the place of collision was on the highway of nations, and was constantly traversed or passed, not only by vessels of all nations going to or from ports in Japan, but also by such vessels when going on voyages from other countries than Japan to some other such countries. It then based its judgment upon these grounds: First, that its rules of procedure and the Orders in Council warranted an order giving leave to file the counter-claim, and to order security to be given, and that those rules and orders did not exceed the provisions of the treaties; second, that apart from the Orders in Council the Court had inherent jurisdiction to allow the counter-claim to be filed, and to order the security to be given; third, that the collision did not occur within the limits of the Empire of Japan, but on the high sea, where Courts of Admiralty have jurisdiction and maritime law applies.

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Cohen, Q.C., Sir *W. Phillimore*, Q.C., *Cautley*, and *Satow*, for the appellants, contended that the order of the Supreme Court ought to be reversed on the ground that Her Britannic Majesty's Court for Japan had no jurisdiction to entertain a complaint against a Japanese, either by original summons or by cross-petition. It could have no such jurisdiction except by virtue of treaties with the sovereign power, and unless those treaties evidenced a grant of such jurisdiction by the Emperor of Japan in derogation of his sovereign rights, there was no basis on which it could rest. The British Courts in Japan were the creations ultimately of treaty, and it was impossible that they should possess, as claimed by the Supreme Court in this case, an inherent power or jurisdiction beyond that which was assigned to them by the treaties, or rather by Orders in Council passed in pursuance of the treaties. Reference was made to the Articles of Convention of Nagasaki of the 14th of October, 1854, agreed to by the contracting Powers on the 18th of October, 1855 (Hertslet's Commercial Treaties, vol. ix. p. 978); to the treaty between Her Majesty and the Tycoon of Japan of the 26th of August, 1858 (ibid. vol. xi. p. 401); a treaty between the United States and Japan of the 29th of July, 1858 (State Papers, vol. xlviii. p. 596); a treaty between Austro-Hungary and Japan of the 18th of October, 1869 (State Papers, vol. lix. p. 529). It was contended that under these treaties the appellant was entitled to bring this action in Her Britannic Majesty's Court for Japan, and that the respondents were not entitled thereunder to prefer a counter-claim in respect of any grievance for which they could have maintained an action in the Japanese Courts, but could not have maintained an action in the British Courts. They did not become entitled so to do by reason of an action having been brought to recover damages in respect of an alleged grievance against the appellant, even though it arose out of the same circumstances as those in respect of which they were being sued. It was open to them to adduce any evidence which would have supported such counter-claim for the purpose of resisting the appellant's demand, but not for the purpose of recovering damages in respect of any negligence by those navigating the *Chishima*, for the treaties not merely omitted to give the Court any such jurisdiction, but

omitted to provide any authority to execute any judgment to that effect. Even if, according to the true construction of the treaties, any discretion was vested in the first Court to allow or disallow the cross-petition, that Court, having regard to the treaties and the circumstances of the case, exercised its discretion rightly. If such discretion, however, is held to be vested in it, it would follow that a similar discretion is vested in the Japanese Court when British plaintiffs sued Japanese defendants therein; and in consequence British subjects might find claims against them by the Japanese rendered amenable to the jurisdiction of the Japanese Courts in a manner and to an extent not contemplated by those treaties, and which would operate to deprive them of the privileges conceded thereby.

As regards Her Majesty's Orders in Council, and the various rules of procedure relating to suits by or against foreigners and to counter-claims or cross-petitions, it was contended that none of them authorized, according to their true construction, the reception of the cross-petition in question. Even if they did, the orders and rules in that respect would be going beyond the limits of the treaties. Even if the Courts below would be bound to act in pursuance of any Orders in Council passed in excess of the treaty powers, still the fact that they would be in excess could not be lost sight of in determining the true construction of their meaning and intent where any doubt could reasonably exist. Reference was made to the Orders in Council of the 3rd of March, 1859 (Hertslet's Commercial Treaties, x. p. 1075); of the 9th of March, 1865 (ibid. vol. xii. p. 281); of the 13th of May, 1869 (ibid. vol. xiii. p. 622); of the 14th of August, 1878 (ibid. vol. xiv. p. 246); of the 25th of October, 1881, and of the 3rd of August, 1886; to the Rules (Nos. 26, 33, 53, 55, 253, 339) of the Supreme and other Courts framed on the 4th of May, 1865, under the Order in Council of the 9th of March, 1865; and to the rules of procedure in Admiralty for the Court for Japan of 1867. In this case the action was brought by the Sovereign, who was for this purpose within the meaning of treaties which in terms related only to Japanese subjects, more especially as he affirmed the jurisdiction of the Court by bringing his action. He could not be sued according to English law, for

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his officers and not himself were liable for any negligence on board the *Chishima*. [THE LORD CHANCELLOR:—Is there any case which allows a counter-claim against a Sovereign?] Reference was made to *The Newbattle* (1); *Chapman* v. *Royal Netherlands Company* (2); *Chartered Mercantile Bank of India* v. *Netherlands Steam Navigation Company* (3); *The Saxonia* (4); *The Hector* (5); *China Merchants' Steam Company* v. *Bignold* (6); *The Amazon* (7).

Further, it was contended that, looking at the situation of the Gogo Shima Straits with reference to the territory of the Empire of Japan, the place of collision was part of the dominions or territorial waters of the Empire of Japan governed by Japanese law. [Their Lordships intimated that, without expressing any approval of the dicta of the Lower Court on the question as to high seas or territorial waters, they would hear the respondents on the other points first.]

Sir *R. Webster*, Q.C., *Finlay*, Q.C., *Pollard*, and *McCarthy*, for the respondents, contended that the appellant, having originally invoked the jurisdiction of the Court for Japan in Admiralty by presenting to it his petition of claim, had admitted the competency of the Court to determine all questions arising out of the collision in question, and had submitted himself generally to its jurisdiction. Having brought his action, the appellant could claim no distinction between himself and a Japanese subject. This counter-claim arose out of precisely the same circumstances as the action, and complete justice could not be done between the parties unless the Court could deal with the mutual claims of the parties against each other, and generally with all the rights and liabilities flowing from the same transaction. It was contended that the Rules of Court provided that a counter-claim could be entertained against a Japanese subject, and that the Government could not take advantage of the jurisdiction conferred without making itself liable thereto as a private individual. The Rules

(1) 10 P. D. 33.
(2) 4 P. D. 157.
(3) 10 Q. B. D. 521.
(4) Lush. 410; S. C. 15 Moo. P. C. 262.
(5) 8 P. D. 218.
(6) 7 App. Cas. 512.
(7) 36 L. J. (Adm.) 4.

of Court in that respect were authorized by Orders in Council. Reference was made to the Order of the 9th of March, 1865, and especially to sects. 4, 54, 117, and 127; and to art. 47 of the Order of the 25th of October, 1881, as amended by art. 2 of the Order of the 3rd of August, 1886. A Japanese subject would have been liable to have his action stayed until he enabled the Court to deal with the whole matter. The High Court of Admiralty here would have dealt with the Japanese Government in the same way. The Orders in Council must be construed in connection with the Foreign Jurisdiction Act (6 & 7 Vict. c. 94), as cited in the preamble to the Order in Council of 1865. And a Japanese subject who sues under the Order in Council must allow the Court to exercise a discretion whether a counter-claim should be filed. He is availing himself of a privilege. [THE LORD CHANCELLOR:—Not a privilege as regards the Japanese, but a fetter. But for the treaties, he could have sued in the Japanese Courts.] The Japanese Government at all events, is not within the letter of the treaties, and if it avails itself of its terms it cannot deny the right of the Court to exercise its discretion. At least, to the extent of extinguishing the appellant's claim, the counter-claim should be allowed for the purposes of an equitable decision. The effect of giving Admiralty jurisdiction to the Consular Courts was to establish an Admiralty Court of precisely similar powers to those existing in this country. Reference was made to Rules of Supreme Court in England, Order XIX., r. 3, and to the *Government of Newfoundland* v. *Newfoundland Railway Company* (1) and *The Charkieh* (2), to shew that the respondents were entitled to counter-claim. By the most favoured nation clause of the treaty of 1858, the treaties with the United States and Austro-Hungary in 1858 and 1869 respectively should be referred to on this point, and in them it was stipulated that all "just claims" should be submitted to the Consular Courts. It was extremely inconvenient that the British Court should be limited to dealing with that part of the case which was directed against the respondents, and that the respondents should be referred to another Court to deal with that

(1) 13 App. Cas. 199. (2) L. R. 1 A. & E. 120.

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part of the case which was directed against the appellant. The plea of res judicata might be used against them if they did. The main action and the cross-action should be heard together and on the same evidence, and consequently by the same Court: see the Admiralty Court Jurisdiction Act, 1861 (24 & 25 Vict. c. 10), s. 34; *The Amazon* (1); and *The Charkieh* (2). Reference was also made to *The Khedive* (3), which overruled *Chapman* v. *Royal Netherlands Company* (4); Williams and Bruce Admiralty Practice, 1st ed. p. 255, 2nd ed. p. 371; *The Seringapatam* (5); *The Heart of Oak* (6); *Hay* v. *Le Neve* (7).

The *Attorney-General*, the *Solicitor-General*, and *Sutton*, for the Crown.

Cohen, Q.C., replied.

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The judgment of their Lordships was delivered by

LORD HERSCHELL L.C.:—

This appeal raises a question of considerable importance in regard to the jurisdiction possessed by the British Consular Courts in China and Japan. The facts lie in a narrow compass.

In November, 1892, a collision occurred between the Emperor of Japan's steam cruiser *Chishima* and the *Ravenna*, a steamer belonging to the respondents, in the Gogo Shima Straits, near the coast of Japan. The *Chishima* sank almost immediately, and the *Ravenna* sustained some damage.

In May, 1893, the appellants filed a petition against the respondents in Her Majesty's Court for Japan, alleging that the disaster was due to the default and negligence of those on board the *Ravenna*, and was not attributable to any one on board the *Chishima*, and that the damage occasioned to the appellants was $850,000.

The respondents in their answer alleged that those on board

(1) 36 L. J. (Adm.) 4.
(2) L. R. 4 A. & E. 120.
(3) 7 App. Cas. 795.
(4) 4 P. D. 157.
(5) 3 Wm. Rob. 38.
(6) 29 L. J. (Adm.) 78.
(7) 2 Shaw's Scotch Appeals, 401.

the *Chishima* were solely to blame for the collision; that no blame was attributable to those on board the *Ravenna*; and that they had sustained loss by reason of the collision amounting to $100,000.

On the 6th of June, 1893, the respondents moved the Court for leave to file a counter-claim in the action, by cross-petition, for the recovery of $100,000 from the appellants, and also for an order that the suit and counter-claim should be heard together, and that the appellants should be required to give security (by deposit or otherwise) to abide by and perform the decision of the Court upon the counter-claim.

The learned judge refused leave to file the counter-claim. He based his judgment upon the ground that the collision had occurred within three miles of the coast of Japan, in the territorial waters of that country; that the liability of the Emperor of Japan, as owner of the *Chishima*, for the negligent acts of the officers and crew of that vessel must therefore be regulated by the law of Japan; and that as, by that law, the Emperor of Japan was not liable for such negligent acts, no action could be maintained against him in respect of them, and consequently no counter-claim ought to be allowed, even if, apart from this objection, it would have been competent for the Court to entertain it.

On appeal, Her Majesty's Supreme Court for China and Japan reversed the judgment of the Court for Japan, and made the order prayed for by the respondents.

The Chief Justice dissented from the law laid down in the Court below. Although the place of the collision might have been within the territorial waters of Japan he thought it was "undoubtedly upon the highway of nations," and that this being so, it must be deemed to have taken place upon the high seas where the law maritime applied, and that by the law maritime the owner of a ship doing damage to another is liable for the negligence of his servants.

In the view which their Lordships take it is unnecessary to decide the question on which the Chief Justice of the Supreme Court and the judge of the Lower Court differed. They think it, however, right to say that they must not be regarded as

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sanctioning the very broad propositions affirmed by the Chief Justice, which are obviously open to serious controversy.

In order to determine whether the order made by the Supreme Court can be sustained, their Lordships think it necessary to inquire into the origin of the extra-territorial jurisdiction exercised by Her Majesty's Consular Courts in Japan, and to ascertain the limits of that jurisdiction.

On the 26th of August, 1858, a treaty of peace, friendship, and Commerce was entered into between Her Majesty and the Tycoon of Japan. This treaty was ratified on the 11th of July, 1859. It provided that Japanese subjects guilty of any criminal act towards British subjects should be punished by the Japanese authorities according to the laws of Japan, and that British subjects who might commit any crime against Japanese subjects or the subjects or citizens of any other country should be tried and punished by the consul or other public functionary authorized thereto according to the laws of Great Britain.

It also contained the following article:—

"ARTICLE 6.

"Complaints of British subjects against Japanese.

"A British subject having reason to complain of a Japanese must proceed to the consulate and state his grievance. The consul will inquire into the merits of the case, and do his utmost to arrange it amicably.

"Complaints of Japanese against British subjects.

"In like manner, if a Japanese have reason to complain of a British subject, the consul shall no less listen to his complaint, and endeavour to settle it in a friendly manner. If disputes take place of such a nature that the consul cannot arrange them amicably, then he shall request the assistance of the Japanese authorities that they may together examine into the merits of the case and decide it equitably."

It will be seen that no jurisdiction was, in terms, conferred by this treaty upon the British consul to entertain a suit where a Japanese had reason to complain of a breach of contract or of a wrong committed by a British subject. It appears to have been

in contemplation that the decision in such cases, if the matter could not be amicably arranged, should be left to a mixed tribunal, consisting of the consul and certain Japanese authorities. This scheme was, however, never put into operation.

A few weeks before the treaty just referred to was made, Japan had, on the 29th of July, 1858, entered into a treaty with the United States of America, which was ratified on the 22nd of May, 1860. It contained the following provision :—

"ARTICLE 6.

"Americans committing offences against Japanese shall be tried in American Consular Courts, and when guilty shall be punished according to American law.

"Japanese committing offences against Americans shall be tried by the Japanese authorities, and punished according to Japanese law.

"The Consular Courts shall be open to Japanese creditors to enable them to recover their just claims against American citizens, and the Japanese Courts shall in like manner be open to American citizens for the recovery of their just claims against Japanese."

There was thus a clear recognition of the right of the Consular Court to exercise jurisdiction in Japan, not only in the case of offences committed by Americans against Japanese, but in the case of civil claims which Japanese might have against American citizens. It cannot be doubted that the intention was that the jurisdiction thus conferred should be exclusive, and that American citizens should enjoy immunity from being sued, as well as from being prosecuted in the local Courts of Japan.

On this point the terms of the treaty entered into a few years afterwards (in October, 1869) between Austro-Hungary and Japan are more precise, but the two treaties do not, in their Lordships' opinion, differ in their substantial effect. The fifth article of that treaty (so far as material) is in the following terms :—

"All questions in regard to rights, whether of property or of person arising between Austro-Hungarian citizens residing in Japan, shall be subject to the jurisdiction of the Imperial and Royal authorities. In like manner, the Japanese authorities

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shall not interfere in any question which may arise between Austro-Hungarian citizens and the subjects of any other treaty power.

"If an Austro-Hungarian citizen has a complaint or grievance against a Japanese subject, the case shall be decided by the Japanese authorities. If, on the contrary, a Japanese has a complaint or grievance against a citizen of the said monarchy, the case shall be decided by the Imperial and Royal authorities."

It is clear that art. 23 of the treaty of August, 1858, which accorded to Great Britain "most favoured nation" treatment, conferred upon this country and its subjects all the privileges and immunities secured to the United States and Austro-Hungary and their respective subjects, by the treaties to which reference has been made. There cannot, therefore, be any doubt that a British subject has a right to require that when a Japanese has a complaint or grievance against him it shall be decided, not by the local Courts of Japan, but by the British authorities exercising in that country extra-territorial jurisdiction. On the other hand, it seems equally clear that any complaint or grievance which a British subject may have against a Japanese subject is to be decided by the Japanese Courts.

The considerations which led to these treaty stipulations, securing immunity from proceedings in local Courts, and the substitution of the extra-territorial jurisdiction of the Courts of the defendant's own nation, are not in doubt. Such treaties with Eastern nations were well known, and had been long in operation before the date of the treaty with Japan. They had their origin in a distrust of the local tribunals, and of the systems of law administered by them. Eastern ideas in these respects were completely out of harmony with the views of Western civilization. During recent years a great change has been wrought in Japan. The circumstances which gave rise to the desire for extra-territorial jurisdiction in that country are ceasing or have ceased. It is nevertheless necessary to keep in mind the conditions which existed at the time the treaties were entered into, and the objects sought to be attained by them, in order rightly to estimate their effect.

It will be convenient now to examine the precise nature of the

petition by way of counter-claim which the respondents sought, and have obtained leave to file. It is in truth a cross-action in which, as plaintiffs, they seek to recover against the present appellants the sum of $100,000, the amount of the damages sustained by them, which they allege were exclusively caused by the negligent acts of those on board the *Chishima*. It is not designed merely as a shield of defence in the action brought by the appellants. It is to be used as a weapon against them. If the action by the appellants should wholly fail, the respondents might nevertheless, by virtue of their counter-claim, obtain a judgment for $100,000, and the appellants have been required to give security to abide by and perform the decision of the Court on the counter-claim, so as to ensure the respondents obtaining the fruits of the judgment in case it should be in their favour.

It needs no argument to shew that, if it were not set up by way of counter-claim, the British Consular Court would have no jurisdiction to entertain such an action in invitum against a Japanese subject. The proper forum would be a Japanese Court. But it is argued for the respondents that where a Japanese is suing in the British Consular Court a counter-claim, though in the nature of a cross-action, ought always to be allowed in respect of any claim having its origin in the circumstances which give rise to the action; that this is necessary in order that complete justice may be done between the parties.

Their Lordships would observe that it is only in recent years that it has become the general practice to allow such counter-claims in the Courts of this country. But, apart from this, they think the argument overlooks the limited scope of the jurisdiction which the Consular Courts are authorized to exercise. They can claim exclusive cognizance of complaints made against British subjects. The territorial Courts are precluded from adjudicating upon them. On the other hand, with claims against a Japanese subject, the Courts of the Sovereign of that country are (unless with the consent of the Japanese and his Government) alone competent to deal. There is nothing to take away this natural right. It is indeed expressly recognised by the treaties. It is said, however, that if a Japanese chooses to sue in a British Consular Court he submits to its jurisdiction in all

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respects; so that if, according to the rules by which its practice and procedure are governed, a defendant is entitled to set up a counter-claim, the plaintiff cannot escape from the obligation to submit to adjudication upon it. He has elected his tribunal, and he must take the consequences of that election. Their Lordships think that this is altogether a false view of the situation. It is not a matter of election on his part to seek his remedy in the Court of the defendant's country. He has no choice. The defendant has obtained, by virtue of a treaty made with his Sovereign, complete immunity from process in the territorial Courts which would otherwise be open to the plaintiff. It is difficult to see on what ground a British subject can insist, when sued in his own Consular Court, that the Court shall take cognizance of and adjudicate upon a claim which he makes against a Japanese. It appears to their Lordships that it would be in violation of the treaty, and in excess of the jurisdiction which the sovereign power of Japan, in derogation of its sovereign rights, has granted to the British Consular Court, if it were to yield to such a contention.

The right of the Courts of Japan exclusively to decide a case where a British subject has a claim against a Japanese rests upon exactly the same basis as the right of the British Consular Court exclusively to decide complaints and grievances against British subjects. The point is one of no small moment. If the respondents' contention be well founded, it must apply equally where a British subject brings an action in a Japanese or Chinese Court in respect of a claim against a Japanese or Chinese subject. The Japanese or Chinese Court would be entitled to allow a counter-claim to be made against a British subject, and to require security to be given to satisfy the counter-claim, whatever its amount and however much in excess of the claim, and to stay proceedings in the action until the security was given. The effect would be to deny the British subject any redress in the local Court except upon the terms of his submitting to its arbitrament a dispute which under the treaty was reserved exclusively for the determination of the British Consular Court.

Such a proceeding would, in their Lordships' opinion, be clearly inconsistent with treaty rights, and it can be no less so

when it is made a condition of suing in the British Consular Court that the Japanese shall submit a claim against himself to the jurisdiction of that Court, and give security so as to enable it to render its judgment effective, in case it should be unfavourable to him.

It is argued that the view for which the appellants contend may not only inflict a hardship upon the respondents but give rise to considerable inconvenience. This may no doubt in some cases be true, but it is a necessary result of the immunity afforded to British subjects from suit in the local Courts. It is the price which they must pay for this immunity. But for the treaty, they would be liable to process in the Courts of Japan. Those Courts would have complete jurisdiction to deal with the case, whether the defendant were a British subject or a Japanese. A British subject cannot claim the advantage of being amenable exclusively to his own Consular Court, and at the same time object to the limited jurisdiction which alone it possesses.

Their Lordships have so far dealt with the case as if it were one in which Japanese subjects were the plaintiffs. It is said that the "Imperial Japanese Government" is merely a name in which the Emperor of Japan elects to sue, and it is suggested that as the treaties do not refer to the Sovereign, but mention only Japanese subjects, the Sovereign when he sues in the British Consular Court must be regarded as voluntarily submitting himself to the jurisdiction, and not as availing himself of his only remedy against British subjects. Their Lordships cannot accede to this view.

The treaties must be interpreted according to their manifest spirit and intent. In construing such instruments a too slavish adherence to the letter would be out of place, although, of course, violence must not be done to the language used. Not only are claims against British subjects to be adjudicated upon in the British Consular Court, but offences committed in Japan against Japanese subjects by British subjects, which are in truth offences against the people and Sovereign of Japan, are to be tried in the same Court. In view of this fact and of the origin of the extra-territorial stipulations, to which attention has been

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called, their Lordships are of opinion that it cannot have been intended that British subjects should be amenable to the local Courts whenever any claim of a civil nature was made by the Government of Japan against a British subject.

Their Lordships have dwelt at length upon the effect of the treaty provisions, because they regard these as determining the question in controversy between the parties.

Much argument was expended on the terms of the Orders in Council relating to the administration of justice in the Consular Courts of China and Japan and to the rules made thereunder. Attention was specially called to art. 54 of the Order in Council of 1865, which provides that the Supreme Court shall be a Vice-Admiralty Court, and shall have all such jurisdiction as for the time being belongs to Vice-Admiralty Courts in Her Majesty's possessions abroad; and to art. 127 of that Order, which empowers the judge to frame rules inter alia for the regulation of cross-suits and the admission of counter-claims. Reliance was also placed on art. 47 of the Order in Council of 1881 (as amended by the Order in Council of 1886), which provided inter alia that a counter-claim or cross-suit was not to be brought or instituted in the Court against a plaintiff, being a foreigner, who had submitted to the jurisdiction, by a defendant except by leave of the Court first obtained.

The effect and scope of this article is by no means clear, and was the subject of much discussion by the learned counsel who argued this case. What is "a submission to the jurisdiction" by a plaintiff who is a foreigner, within the meaning of this article, is no doubt open to controversy. Their Lordships do not find it necessary to express any opinion upon the arguments addressed to them in relation to the construction of the Orders in Council. It is clear that these could not operate to confer a jurisdiction upon the British Courts in Japan wider than was acquired by treaty. If indeed an Order in Council in terms prescribed something which was inconsistent with the treaty, it may be that the consular judge would be bound to conform himself accordingly, and that the party aggrieved would have to seek redress through the diplomatic intervention of his Government. But no such difficulty arises in the present case.

There is no necessary conflict between the treaty rights and any of the provisions of the Orders in Council. They may all have full effect given to them without stretching the consular jurisdiction beyond its legitimate treaty limits.

The 4th article of the Order in Council of 1865 provides that "All Her Majesty's jurisdiction exerciseable in China or in Japan for the judicial hearing and determination of matters in difference between British subjects or between foreigners and British subjects . . . . shall be exercised under and according to the provisions of this Order and not otherwise."

It will be observed that it only purports to prescribe how the jurisdiction exercisable is to be exercised. What jurisdiction the Court possesses must be determined ab extrâ. Moreover, a counter-claim can only be brought against a British subject by leave of the Court, and it would obviously not only not be imperative on the Court to grant such leave, but would be wrong to grant it where it was sought by means of it to bring within the jurisdiction of the Court a matter which by treaty was outside its jurisdiction.

While their Lordships are of opinion that the counter-claim ought not to be allowed, the views they have expressed will not interpose any obstacle to the respondents using every means of defence to the appellants' claim. If they can shew that the *Chishima* was alone to blame, or that the *Ravenna* was not to blame, they will succeed in defeating it. If it should appear that both vessels were to blame a question of some difficulty may arise. It is clear that the plaintiffs, according to the law administered in the Admiralty Court, could recover in that case no more than one-half of the damage they have sustained. It is further clear that if there were a cross-suit upon which the Court was competent to adjudicate the damage sustained by both vessels would be ascertained, and each would bear half of the total loss.

In a case in the Supreme Court of China and Japan, before Sir Edmund Hornby, that learned judge having found both vessels to blame ordered (although there was no counter-claim) that the damages sustained by both vessels should be referred to the registrar, and that each should bear half the total loss,

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remarking that he did this under his equitable jurisdiction. It is presumed that the effect of this order was not to make any sum payable to the defendants, but merely to diminish pro tanto the claim of the plaintiffs.

In the Admiralty Court of this country, where in an action a decree was pronounced that both vessels were to blame, and it was impossible for the defendant by reason of the plaintiff being a foreigner to prosecute a cross-action against him, the Court has withheld the payment of the moiety of the damage sustained by the plaintiff's ship until he submitted to the deduction of a moiety of the damage sustained by the other ship: *The Seringapatam.* (1)

Whether, in the present case, supposing both vessels should be found to blame, the Court could properly adopt either of these courses, it would be altogether premature to decide at the present time.

Their Lordships will humbly advise Her Majesty that the order appealed from should be reversed, and the order of Her Majesty's Court for Japan restored, and that the respondents should pay the costs here and in the Supreme Court.

Solicitors for appellant: *Gibson, Weldon & Bilbrough.*
Solicitors for respondents: *Freshfields & Williams.*
Solicitors for the Crown: *The Treasury.*

(1) 3 Wm. Rob. 38.

[PRIVY COUNCIL.]

PENINSULAR AND ORIENTAL STEAM NAVIGATION COMPANY . . . . } DEFENDANTS;

AND

TSUNE KIJIMA AND OTHERS . . . . PLAINTIFFS.

J. C.* 1895 May 28; July 20.

ON APPEAL FROM THE SUPREME COURT FOR CHINA AND JAPAN.

Practice in Admiralty Court—Suit under 9 & 10 *Vict. c.* 93—*Misjoinder of Plaintiffs—Misjoinder of Causes of Action.*

In a suit under Lord Campbell's Act numerous plaintiffs sought to recover separate damages as due to each plaintiff or group of plaintiffs for injuries resulting from a maritime collision alleged to have been caused by the negligence of the appellants:—

Held, that there was no authority expressed in or to be implied from the rules of Court to warrant the joinder in one suit of different and distinct causes of action not being causes of action by and against the same parties.

Smurthwaite v. *Hannay* ([1894] A. C. 494) followed.

APPEAL from an order of the Supreme Court (April 23, 1894) reversing an order of Her Britannic Majesty's Court for Japan (Dec. 13, 1893), which dismissed the action brought in that Court.

The appellants applied to the Court for Japan, under No. 39 of the rules applicable to the Courts in China and Japan, to have the action against them dismissed. The question raised was whether rule 39 was modified by rule 339 as introducing the procedure of the English Courts, and whether, if so, the Court had a discretion to entertain the suit, which it ought to exercise favourably to the plaintiffs.

The Court for Japan granted the application and dismissed the action.

The Supreme Court said:—

"The burden lies on the defendants to shew that words which

* *Present:*—THE LORD CHANCELLOR (LORD HERSCHELL), LORD WATSON, LORD MACNAGHTEN, LORD SHAND, LORD DAVEY, and SIR RICHARD COUCH.

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in their natural and ordinary meaning are permissive merely must be read in their favour and in no other way. They have to shew that they have an absolute right to call upon the Court to exercise the power conferred on it by rule 39 in the way they ask, viz., by dismissing the petition. We think they have failed to shew this. We cannot find in the rules of this Court, in any statute, or in any rule of pleading now in force in England any absolute right such as they contend for.

"We therefore think that the Court had a discretion in this case, and we also think that under all the circumstances of the case that discretion should be exercised in favour of the plaintiffs."

Finlay, Q.C., and *Pollard* (Sir *R. Webster*, Q.C., with them), for the appellants, contended that the petition was properly dismissed, both under rule 39 and also under the English procedure referred to in rule 339; Order XVI., r. 1, of the rules under the English Judicature Acts having been referred to by the Supreme Court. *Hannay* v. *Smurthwaite* (1) was relied upon as laying down the principle upon which the Courts in England allow several plaintiffs, though alleging distinct causes of action, to join in one petition. But that case has, since the date of the Supreme Court judgment, been overruled by the House of Lords (2); and when that judgment is read in the light of the subsequent decision just cited it is in favour of the appellants. Reference was also made to *Booth* v. *Briscoe* (3) and to *Appleton* v. *Chapeltown Paper Company* (4).

The respondents did not appear.

1895 *July* 20.

The judgment of their Lordships was delivered by

Lord Macnaghten:—

On the 30th of November, 1892, a collision occurred between the *Chishima*, an Imperial Japanese cruiser, and the *Ravenna*, a steamship belonging to the appellants, the Peninsular and Oriental Steam Navigation Company. The *Chishima* sunk

(1) [1893] 2 Q. B. 412.
(2) [1894] A. C. 494.
(3) 2 Q. B. D. 496.
(4) 45 L. J. (Ch.) 276.

immediately, and there was great loss of life among those on board.

On the 29th of November, 1893, under the Act 9 & 10 Vict. c. 93, commonly known as Lord Campbell's Act, a suit was commenced against the appellants by petition in Her Majesty's Court for Japan, on behalf of sixty-two different persons, or groups of persons, who were all joined as co-plaintiffs. The petition alleged that the disaster was caused solely by the negligence of the servants of the appellants. And each of the persons and groups of persons who together constituted the plaintiffs on the record claimed to represent some one of the seamen on board the *Chishima* who were drowned in the shipwreck, and to be entitled separately to damages for the injury resulting from his death.

On being served with the petition the appellants applied for an order that the suit should be dismissed with costs, on the ground that distinct causes of action were improperly joined in the petition. The application was granted by the Court of First Instance; but the order was discharged with costs by the Supreme Court of China and Japan, from whose decision the present appeal has been brought.

As the appeal to Her Majesty in Council came on to be heard ex parte the respondents were not represented at the bar, but their case was very fully and very ably stated in a written argument addressed to the Supreme Court, which left nothing more to be said on their behalf.

It appears that the rules of Her Majesty's Courts in China and Japan, which were framed under an Order in Council dated the 9th of March, 1865, do not contain anything bearing upon the question beyond what may be gathered from the following provisions:—

Rule 39: "In case a petition states two or more distinct causes of suit, by and against the same parties, and the same rights, the Court may either before or at the hearing, if it appears inexpedient to try the different causes of suit together, order that different records be made up, and make such order as to adjournment and costs as justice requires.

"In case a petition states two or more distinct causes of suit,

J. C. 1895 P. & O. Co. v. Tsune Kijima.

but not by or against the same parties, or by and against the same parties but not in the same rights, the petition may, on the application of any defendant, be dismissed.

"In case such application is made within the time for answer, the petition may be dismissed, with substantial costs to be paid by the plaintiff to the defendant making the application; but in case the application is not made within the time for answer, the petition, when the defect is brought to the notice of the Court, may be dismissed without costs, or upon payment of Court fees only, as to the Court seems just."

Rule 339: "In all matters not in these rules expressly provided for, the procedure of the Superior Court and of justices of the peace in England in like cases shall, as far as possible, be followed, save that with respect to matters arising under the Admiralty or other special jurisdiction, the procedure of the Court having such jurisdiction in England shall, as far as possible, be followed."

The view of the Supreme Court was that the language of rule 39 was permissive only, and that rule 339 had the effect of bringing in the procedure of the Superior Courts in England. Accordingly, they held that the Court had a discretion in the matter, and founding their decision on the judgment of the Court of Appeal in England in *Hannay* v. *Smurthwaite* (1), which was then unreversed, they came to the conclusion that under all the circumstances of the case that discretion ought to be exercised in favour of the plaintiffs in the action.

The judgment of the Court of Appeal in *Hannay* v. *Smurthwaite* (1) has since been reversed by the House of Lords: *Smurthwaite* v. *Hannay* (2); and it is clear that such a suit as the present is not and never was maintainable in England. The result is that the arguments on which the respondents succeeded before the Supreme Court are now turned against them. They are compelled to fall back on the rules of the Courts of China and Japan, and there they are met with this difficulty, that nothing is to be found in those rules to warrant the joinder in one suit of different and distinct causes of action not being causes of action by and against the same parties. There is no

(1) [1893] 2 Q. B. 412. (2) [1894] A. C. 494.

authority there express or implied for so great a departure from settled practice.

The language of rule 39 is no doubt, in form, permissive. The reason why that form was adopted is not perhaps quite clear. It may have been intended to leave room for the introduction of any change of procedure that might be sanctioned in England, or it may have been used merely to emphasize the point that a suit wrongly constituted by the joinder of distinct causes of action by different persons may be dismissed on the application of any defendant without regard to the nature of his interest in the litigation. Whatever the true explanation may be, it is, in the opinion of their Lordships, impossible to construe the language of the rule with regard to the dismissal of such suits as impliedly authorizing their institution.

Their Lordships will therefore humbly advise Her Majesty that the appeal ought to be allowed with costs and the suit dismissed with costs in the Supreme Court and the Court of First Instance.

Solicitors for appellants: *Freshfields & Williams.*

[HOUSE OF LORDS.]

H. L. (Sc.) 1895 May 14.

SCHULZE . . . . . APPELLANT;

AND

CORPORATION OF GALASHIELS. . . RESPONDENTS.

(ORIGINAL AND CROSS APPEALS.)

Street—Burgh—"Regular Line of the Street"—Police and Improvement (Scotland) Act, 1862 (25 & 26 *Vict. c.* 101), *s.* 162.

By sect. 162 of the Police and Improvement (Scotland) Act, 1862, it is enacted, "When any house or building, any part of which projects beyond the regular line of the street, or beyond the front of the house or building on either side thereof, has been taken down in order to be altered, or is to be rebuilt, the commissioners may require the same to be set backwards to or toward the line of the street, or the line of the adjoining houses or buildings":—

Held, that the expression "regular line of the street" must be taken to mean the line of the buildings forming the street, and not a line indicating that part of the street which is dedicated to the public as highway.

Burgh—Street—Height of Buildings—General Turnpike (Scotland) Act, 1831 (1 & 2 *Will.* 4, *c.* 43).

By sect. 91 of the General Turnpike (Scotland) Act, 1831, it is enacted "That no houses, walls, or other buildings above seven feet high shall be erected without the consent of the trustees . . . . within the distance of twenty-five feet from the centre of any turnpike road." The burgh of Galashiels, by sect. 40 of the local Act of 1876, adopted clauses 83 to 92 of the General Turnpike (Scotland) Act, 1831, "so far as the said clauses are applicable to the roads and streets within the extended burgh, and in so far as the same are not inconsistent with this Act and the Police Act":—

Held, that the corporation of the burgh had power under these Acts to restrain a proprietor of vacant land situate within twenty-five feet of the centre of the street from erecting a building thereon above the height of seven feet.

APPEAL and cross appeal from an interlocutor (dated March 20, 1894) of the First Division of the Court of Session, Scotland (1).

(1) 21 Court Sess. Cas. 4th Series (Rettie), 682.

The appellant, William Schulze, was proprietor of two houses in Channel Street, Galashiels, fronting the street; and he was also proprietor of an adjoining piece of vacant ground forming the corner plot of Channel Street and Park Street. He had taken down the two houses and proposed to rebuild them. The corporation of Galashiels, the respondents in the original appeal, objected to his doing this.

The first question was whether the appellant Schulze was entitled to erect new buildings on the same site as the old, or whether he could be compelled to set them back thirteen or fourteen feet to a line which the corporation alleged to be the regular line of the street. That question depended on the terms of sect. 162 of the Police and Improvement (Scotland) Act, 1862, which is as follows:—

"When any house or building, any part of which projects beyond the regular line of the street, or beyond the front of the house or building on either side thereof, has been taken down in order to be altered, or is to be rebuilt, the commissioners may require the same to be set backwards to or toward the line of the street, or the line of the adjoining houses or buildings, in such manner as the commissioners may direct, for the improvement of such street."

It appeared that in 1877–8 the corporation of Galashiels proposed to improve Channel Street, which is one of the leading thoroughfares in the burgh and about 200 yards long, by widening the street to a uniform width of forty feet. Subsequently they acquired from the various proprietors the whole ground on the north side of the street for carrying out this improvement with the exception of the ground on which stood the property of the appellant Schulze; secondly, the property of a Mr. Macqueen, which adjoins Schulze's to the east; and, thirdly, Messrs. Gillies' property, a little further to the east. These houses appeared on a plan of 1877 to be all in line—that is, that Schulze's houses did not project beyond Macqueen's; but they were all over the proposed line of the street. Schulze contended that his houses did not project beyond the "regular line of the street" because, as he alleged, there was none; and he appealed to a plan made in 1893. This plan shewed that the proposed line of the street

H. L. (Sc.) 1895 SCHULZE v. CORPORATION OF GALASHIELS.

was interrupted by the houses of the above three proprietors. It also shewed that about half-way down the street, east of Schulze's and eastward of an hotel called Douglas's Hotel, the houses fell back much behind, and were not parallel with, a coloured line shewn upon the plan as the proposed line of the street. In 1877 these houses to the east of Douglas's Hotel had enclosed plots of ground in front of them overlapping the line. The proprietors were willing to let the corporation have the ground necessary for widening the street, but the proprietors stipulated that the corporation should take over and pave the whole of the front plots, and that in the event of any of those proprietors rebuilding his house he should be entitled to bring the front forward to the new line of street. The corporation accordingly paved these front plots, and ran a line of coloured material along the pavement upon the proposed line of street. There then remained a paved space between the houses and the line.

The second question was whether Schulze could build to any height he liked on the hitherto vacant piece of ground adjoining his houses. This question depended on the construction of the 91st section of the General Turnpike Road (Scotland) Act, 1831 (1 & 2 Will. 4, c. 43), by which it is provided that "No houses, walls, or other buildings above seven feet high shall be erected without the consent of the trustees . . . . within the distance of twenty-five feet from the centre of any turnpike road. The Galashiels Municipal Extension Police and Water Act, 1876 (39 & 40 Vict. c. lx.), s. 40, incorporated, inter alia, clauses 83 to 92 of the General Turnpike Road (Scotland) Act, 1831, "so far as the said clauses are applicable to the roads and streets within the extended burgh, and in so far as the same are not inconsistent with this Act and the Police Act, shall, from and after the 15th of May, 1877, extend and apply to all the roads and streets within the extended burgh." The section then provides, where "trustees under any turnpike Act" are mentioned, or "turnpike roads," those words shall be construed as applying "to the corporation and to the said roads and streets" of the burgh.

In the first question the Lord Ordinary (Low), on the 9th of

June, 1893, held that the street had actually been widened to the proposed regular breadth of forty feet to the line of the street marked upon the pavement, and that in these circumstances the street had a regular line according to the fair and ordinary use of language. Further, that the fact of three properties having a frontage of forty to fifty yards in a street of 200 yards which project beyond the line was just the kind of case which the Act of 1862 gave the corporation power to take advantage of. He therefore restrained Schulze from rebuilding beyond the line in question.

In the second question the Lord Ordinary held that sect. 91 of the Turnpike Act was applicable, and restrained Schulze from building on his unbuilt piece of ground to a greater height than seven feet.

The First Division of the Court of Session (Lord Kinnear delivering the opinion of the Court) reversed the Lord Ordinary on the first question, and affirmed him on the second point.

1895. May 13, 14. The appellant, Schulze, heard in person, contended that the decision on the second question was wrong, for to give the 91st section of the General Turnpike Act the meaning asked for would be to deprive him of a valuable right without compensation. Such a meaning might be appropriate to vacant land where there was ground to fall back upon; but to apply it to a town would be harsh in the extreme, depriving owners of valuable town plots without paying for them; that the Act never could have been intended to apply to a town, for by sect. 61 five of the feet measuring from the centre of the road are to be a provision for "bank, ditch, and fence," which could not be carried into effect in the interior streets of a town.

The *Lord Advocate* (*Balfour*, Q.C.), and *Finlay*, Q.C., were heard in the cross appeal for the corporation of Galashiels. They maintained that the regular line of the street was the line which divided the public street from that which was not street, and that there was no irregularity in the line—the line of coloured material dividing the public street from what was private property.

H. L. (Sc.) 1895. May 14. Lord Herschell L.C.:—

1895

Schulze v. Corporation of Galashiels.

In this case both parties have appealed from an interlocutor of the Court of Session, which on one point affirmed, and on the other reversed, the decision of the Lord Ordinary.

I will deal first with the point which has been last argued, the question upon the cross appeal, whether the Inner House were right in the view which they took, contrary to the view of the Lord Ordinary, that the respondent on that appeal could not be compelled to set back buildings which he proposed to erect in place of buildings which had been pulled down. The old buildings abutted on a street called Channel Street, in the town of Galashiels. The corporation of the borough of Galashiels purported to act under the 162nd section of the Police and Improvement (Scotland) Act. That section provides: [His Lordship read it as given above, and proceeded:—] The question is whether the Corporation have power to require him to set back his buildings to the regular line of the street within the meaning of that section. The Inner House came to the conclusion that the corporation had not made out that what they contended to be the regular line of the street was the regular line of the street, and therefore that their order could not be supported.

It appears that the corporation had in view, some years ago, a widening of Channel Street, and they made an arrangement with the owners of houses and property in the eastern part of Channel Street by which the corporation acquired land in front of those houses belonging to the proprietors, and threw a portion of that land, as they say, into the street. In point of fact, all the land they took was paved with flags and became open to the use of the public; but along the parts so paved and flagged a line was drawn in coloured bricks or cement or some other material in order to shew, no doubt, what was contemplated as the future line of the street. The buildings remained in their former position, not having a regular and uniform frontage, and certainly not having a frontage which was regular or uniform with the buildings further to the west.

The main question to be determined, I think, is this: What is the meaning of the words "regular line of the street"? I think

in sect. 162 those words have reference, in a street that is built upon, to the line of the buildings, and not to the line of the street in the sense contended for by the corporation, namely, the line which they have drawn as indicating that part which is dedicated to the public as highway. The object of sect. 162 was, I think, to secure uniformity in building. If there was a "regular line of the street," then there was authority to direct a building to be set back to that regular building line. If there was no regular line of that street in that sense then, they might direct it to be set back to uniformity with the houses or buildings on either side of it. That, I think, was the real object and intention of the section; and in that sense I agree with the Court below that it is impossible to say that there was a "regular line of the street" to which the corporation could require the respondent in the cross appeal to conform. My Lords, for that simple reason I think that the interlocutor in so far as it is appealed from in the cross appeal should be affirmed.

The other appeal is an appeal by Mr. Schulze, the respondent in the appeal, with which I have just dealt. He proposed on a piece of vacant land to erect a building. The corporation of Galashiels insisted that he was not entitled to erect a building more than seven feet high which should be within twenty-five feet of the centre of the road. Whether or not they were justified in imposing that restriction depends upon the effect of sect. 40 of the Galashiels Municipal Extension Police and Water Act, 1876. [His Lordship read the section as given above.]

Now the General Turnpike Act, it cannot be disputed, does provide that without the consent of the trustees a building over seven feet high may not be erected within twenty-five feet of the centre of the road. That is provided by sect. 91, which is in terms applied to the burgh so far as the clauses are applicable, and are not inconsistent with the Galashiels Act or the Police Act.

It seems clear, therefore, that it rests upon any one who insists that the provision is not applicable to a street in Galashiels to shew that the provision is not consistent with something to be found either in the Galashiels Act or in the Police Act. My Lords, I have listened attentively and given full considera-

H. L. (Sc.) 1895 SCHULZE v. CORPORATION OF GALASHIELS. Lord Herschell L.C.

tion to the points put before your Lordships by the appellant, Mr. Schulze, who has argued his case in person; but I am unable to see that there is any inconsistency between a provision requiring that no building over seven feet high shall be erected within twenty-five feet of the centre of the road without the consent of the corporation, and any provision to be found either in the Galashiels Act or in the Police Act. There are provisions, no doubt, in the Police Act with regard to building operations and building plans; there are provisions in the Galashiels Act and the Police Act with regard to improving roads and widening them; but I am unable to find any provision in either of those Acts which can be said to be inconsistent with a requirement such as is to be found in sect. 91 of the General Turnpike Act.

My Lords, it is not for your Lordships to give any effect to the argument urged by the appellant, on the ground of the hardship of transferring such a provision as that with which your Lordships have to deal to the burgh of Galashiels, and making it applicable to a town in which there are, no doubt, very many streets of such a width that this would practically prohibit building upon vacant land altogether. I am not particularly in love with legislation of this kind, which takes provisions out of the Turnpike Act which are perfectly suitable and properly applicable to the great bulk of turnpike roads, or to the whole of them, and transfers them bodily into a burgh Act, although obviously they would not be suitable or applicable to all the streets or roads of the burgh. I could quite conceive of clauses so introduced being used by a corporation very hardly and harshly as regards an owner of property abutting on the streets of the burgh. This I will say, that it by no means follows, in my view, that because these provisions become by their incorporation in point of law applicable to all the streets in the burgh, it would be a proper thing for the corporation to treat them as applicable in every case, and to insist in every case upon their applicability by refusing their consent to a building which did not conform to them. But the Legislature has left that matter to the corporation, assuming no doubt that it would exercise the powers committed to it reasonably and justly, and not unreasonably or unjustly. If in any

particular case (though that is a matter with which your Lordships have not to deal) they should press hardly upon an owner of property abutting on a street in their burgh, that is a matter between the individual and the corporation—a matter for appeal to them as trustees of the public interests, and at the same time of the rights of the citizens over whom they are the constituted authority. It is not a matter which this House can consider as any ground for departing from the conclusion to which it would otherwise come upon the construction of an Act of Parliament.

For these reasons, I think that in both these appeals the interlocutor appealed from must be affirmed, and the appeals dismissed.

LORD WATSON :—

I concur, and do not think it necessary to add anything to the reasons which have been assigned by the noble and learned Lord on the Woolsack for the judgment which he has moved.

LORD SHAND :—

I am entirely of the same opinion ; and I shall only add, that if it had appeared upon the evidence before us, which is practically contained in the plans produced by the parties, that the line of building projected in 1877 by the town of Galashiels had been given effect to throughout the larger portion of that street which is called Channel Street, I should have been disposed to hold, and should have held, with Lord Low, who dealt with the case in the first instance, that the burgh were entitled to require Mr. Schulze to set back his building now. But looking at that plan, and the plan shewing the existing state of the buildings, I am of opinion, with the learned judges of the First Division, that it has not been shewn that there is a regular line of street to which Mr. Schulze can be required to conform. There are not only parts of the street breaking the line in his immediate neighbourhood, but at some distance there is a large space of ground fronting a number of different houses now occupied as part of the public street, which destroys the uniformity of the line of buildings. On that ground I agree in thinking that the

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case of the appellants, the corporation of the burgh, in the cross appeal fails.

Upon the other point in the case, in which the Lord Ordinary and the Inner House were agreed, I have nothing to add to what has been said by my noble and learned friend the Lord Chancellor.

Interlocutor appealed from affirmed and appeals dismissed, each party to bear their own costs in this House.

Lords' Journals, May 14, 1895.

Agents for Schulze: *Helder, Roberts, Son & Walton, Solicitors, for Andrew Tosh, S.S.C., Edinburgh.*

Agents for magistrates: *Clayton, Sons & Fargus, Solicitors, for Bruce & Kerr, W. S., Edinburgh.*

[PRIVY COUNCIL.]

J. C.*
1895
July 10.

In re BOWER-BARFF PATENT.

Prolongation—Petition by Assignee of Inventor.

An extension of a patent will not be granted to the assignee of an inventor unless the inventor would himself have been entitled thereto, and will himself derive benefit directly or indirectly therefrom.

THIS was a petition by the Bower-Barff Rustless Iron Company, Limited, for an extension of the letters patent granted on the 28th of July, 1881, to Barff and Bowers for an invention of "improvements in effecting the protection of iron and steel surfaces and in the furnaces employed therein"; of which the company had taken an assignment in 1882.

It stated that the company had incurred great expense in working the invention and introducing the same to the public, that they had never been in a position to pay a dividend, having on the contrary lost large sums of money through the tardy development of the process for the protection of iron and steel from rust in this country and other difficulties; that the company had derived no benefit from the foreign and colonial patents in respect of the invention, which had been sold by the patentees to a French company; that the company had received no adequate return having regard to the merits of the invention, the real value of which was only now on the point of being understood.

Moulton, Q.C., and *Lawson*, for the petitioners.

Sutton, for the Crown, referred to *Claridge's Patent* (1); *Norton's Patent* (2); *Morgan's Patent* (3); *Johnson's Patent* (4).

* *Present*:—Lord Watson, Lord Hobhouse, Lord Macnaghten, Lord Davey, and Sir Richard Couch.

(1) 7 Moo. P. C. 394.
(2) 1 Moo. P. C. (N.S.) 339.
(3) 1 Webster's Patent Cases, 737.
(4) L. R. 4 P. C. 75, 82.

J. C. 1895

In re Bower-Barff Patent.

Moulton, Q.C., replied, referring to *Napier's Patent* (1); *Bodmer's Patent* (2); *Pitman's Patent* (3); *Berry's Patent* (4).

The judgment of their Lordships was delivered by

Lord Watson:—

The petition in the present case appears to their Lordships to be defective in substance, inasmuch as it does not disclose the amount of the profits, if any, which have been made by the inventors and assignees in the various countries in which they have secured an exclusive privilege. At the same time their Lordships are not inclined to reject the petition upon that ground, because the accounts which have been lodged do give information with regard to profits derived from some of the foreign patents which their Lordships consider sufficient to enable them to dispose of this application. The accounts shew that the original inventors have received substantial remuneration. They have sold their patent in Great Britain, in France, and in America for sums amounting in all to 30,000*l.*, and even after allowing a reasonable deduction for those items which they have disbursed, there still remains to the good a very considerable sum of money; and it must be borne in mind that if the patentees were here claiming an extension they would be obliged to account for the profits that have been made in France and America by the use of the patent in those countries during the continuance of the American and French patents.

But the more important question which arises in this case appears to their Lordships to be whether the petitioners, the Bower-Barff Rustless Iron Company, Limited, who are the assignees of the British patent, are in a position to maintain this application for its extension.

The cases of *Claridge's Patent* (5) and of *Norton's Patent* (6) appear to their Lordships to establish the principle that an assignee who has acquired a patent as the subject of a commercial adventure is not entitled to obtain a prolongation when

(1) 13 Moo. P. C. 543.
(2) 6 Moo. P. C. 468.
(3) L. R. 4 P. C. 84, 88.
(4) 7 Moo. P. C. 187.
(5) 7 Moo. P. C. 394.
(6) 1 Moo. P. C. (N.S.) 339.

the inventor himself could have no legitimate interest in making such an application. In one of those cases the judgment of this Board went expressly upon the ground that the applicants were a commercial company, and that the original inventor was dead, and could have no further interest in the patent. In this case one of the original patentees is dead. The others are alive, but they are for all practical purposes, and for all the purposes of the present question, in the same position as if they were dead, because they can no longer have an interest to ask for a prolongation on their own account, seeing that they have been sufficiently remunerated at the expense of the public. There is no case in which this Board has granted an extension of a patent to an assignee which did not directly or indirectly tend towards the benefit of an original inventor who would, had there been no assignment, have been in a position to claim an extension himself. In this case the inventors are not in that position, and as their Lordships do not see any reason for departing from the principle already recognised by the Board in similar applications, they will humbly advise Her Majesty to dismiss this petition.

Solicitors for the petitioners: *J. H. & J. Y. Johnson.*
Solicitor for the Crown: *The Solicitor to the Treasury.*

The Mode of Citation of the Volumes of the LAW REPORTS, commencing January 1, 1895, will be as follows:—

In the First Series,
[1895] 1 Ch. [1895] 2 Ch.

In the Second Series,
[1895] 1 Q. B. [1895] 2 Q. B. [1895] P.

In the Third Series,
[1895] A. C.

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BILL OF SALE—*Hiring Agreement, Construction of*—*Option to Purchase*—*Property in Goods*—*Bankruptcy*—*Bills of Sale Acts.*] By an agreement in writing the "owners and lessors" of a gas-engine agreed to let, and the "lessee" agreed to hire, the engine at a rent to be paid by instalments amounting in all to £240; upon payment in full the agreement to be at an end and the engine to become the property of the lessee, but until payment in full to remain the sole and absolute property of the lessors. It was also agreed that in case of failure to pay any of the instalments or if the lessee should become bankrupt the lessors might elect either to recover the full balance remaining due, or instead to resume possession of the engine and sell it and, after retaining out of the purchase-money all expenses and the balance remaining due, pay the surplus (if any) to the lessee. Provided that if the

BILL OF SALE—*continued.*
lessors should see fit to resume possession of the engine without selling, the loss to them occasioned by the lessee's non-performance of the agreement should be borne by him, and in case of bankruptcy the lessors should be entitled to prove against his estate for that loss as liquidated damages.—The lessee paid the first instalment and the engine was placed on his premises. While it was still there he became bankrupt, some instalments being overdue. The lessors having taken no steps to recover the balance due or to sell:—*Held*, that upon the true construction of the agreement the property in the engine never passed to the lessee, but remained in the lessors; that the transaction was therefore not within the Bills of Sale Acts, and that the lessors were entitled to an order of the Bankruptcy Court for delivery of the engine to them.—The decision of the Irish Court of Appeal ([1894] 1 I. R. 235) affirmed upon the above ground. McEntire *v.* Crossley Brothers - - - - 457

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See Cases under Privy Council Appeals —Canada.

CANAL—*Right to support for Canal—Mines under or near Canal—Compensation for not working Mine—Apprehended danger to Canal from working of Mine—Right of Action for Injury to Canal —Undertaking by Canal Company not to sue.*] A special Act, empowering a company to make a canal, by sect. 39 reserved to the owners of lands in, upon, or through which the canal was to be made the mines and minerals within or under the lands to be set out or made use of for the canal, and authorized the owners to work such mines and minerals, not thereby injuring the canal. Sect. 40 provided that if the owner of any mines should in working such mines work near to or under the canal, so as in the opinion of the canal company to endanger or damage the canal, or in the opinion of the owner of the mines to endanger or damage the further working of the mines, it should be lawful for the company to treat and agree with the owner for all such minerals as might be near or under the canal as should be thought proper to be left for the security or preservation of the canal; and in case they should disagree, a jury might, at the request of the company or of the owner, be summoned to assess what satisfaction such owner ought to receive from the company on being restrained from working such mines:—*Held*, that an owner of mines adjacent to but not under the canal did not come within sect. 39 and was under no statutory liability towards the canal company in working his mines: consequently that if the working of such

CANAL—*continued.*
mines near the canal would not endanger or damage the further working of the mines, although it would cause some damage to the canal, the owner could not under sect. 40 insist against the will of the company upon minerals being left for the security and preservation of the canal and upon receiving satisfaction from the company therefor, the company being willing that the owner should work as he pleased, and preferring from time to time to bear the expense of the necessary repairs to the canal rather than compensate the owner for his unworked minerals.—The decision of the Court of Appeal ([1894] 2 Q. B. 632), that the appellants were not entitled to proceed under sect. 40, affirmed upon the above ground, the appellants' mines being adjacent to but not under the canal.—*Quære*, as to the propriety of the terms imposed by the Court of Appeal.—*Knowles* v. *Lancashire and Yorkshire Railway Company* (14 App. Cas. 248) and *Cromford Canal Company* v. *Cutts* (5 Rail. Cas. 442) distinguished. Chamber Colliery Company *v.* Rochdale Canal Company - - - 564

CAPE OF GOOD HOPE, LAW OF - 451, 606
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CASES—*Adams* v. *Angell* (5 Ch. D. 634) approved
See Mortgage. [11

—— *Attorney-General* v. *Mill* (2 Dow. & Cl. 393) distinguished - - - - 89
See Privy Council Appeals—Victoria. 3.

—— *Bathurst* (*Borough of*) v. *Macpherson* (4 App. Cas. 256) explained - - 433
See Privy Council Appeals — New South Wales. 5.

—— *Chasemore* v. *Richards* (7 H. L. C. 349) commented on - - - - 587
See Watercourse.

—— *Colonial Government* v. *British South African Company* (9 Juta, 280) approved 606
See Privy Council Appeals—Cape of Good Hope. 1.

—— *Cowley* v. *Newmarket Local Board* ([1892] A. C. 345) followed - - 433
See Privy Council Appeals — New South Wales. 5.

—— *Cromford Canal Company* v. *Cutts* (5 Rail. Cas. 422) distinguished - - 564
See Canal.

—— *Evans* v. *Harlow* (5 Q. B. 624) approved 154
See Libel.

—— *Hartnall* v. *Ryde Commissioners* (4 B. & S. 361) overruled - - - 433
See Privy Council Appeals — New South Wales. 5.

—— *Hindle* v. *Taylor* (5 D. M. & G. 577) approved - - - - 264
See Privy Council Appeals — New South Wales. 6.

—— *Knowles* v. *Lancashire and Yorkshire Railway Company* (14 App. Cas. 248) distinguished - - - - 564
See Canal.

CASES—*continued.*

—— *Lee* v. *Butler* ([1893] 2 Q. B. 318) distinguished - - - - 471
See FACTOR.

—— *London County Council* v. *Churchwardens, &c., of Erith* ([1893] A. C. 562, 592) considered - - - - 136
See POOR-RATE. 2.

—— *Mersey Docks* v. *Liverpool* (L. R. 7 Q. B. 643) approved - - - 136
See POOR-RATE. 2.

—— *Perry-Herrick* v. *Attwood* (2 De G. & J. 21) followed - - - - 173
See PRINCIPAL AND AGENT.

—— *Pyle Works, In re* (44 Ch. D. 534), approved - - - - 244
See PRIVY COUNCIL APPEALS — NEW SOUTH WALES. 3.

—— *Reg.* v. *Hull Dock Company* (18 Q. B. 325) commented on - - - 136
See POOR-RATE. 2.

—— *Saunders* v. *Vautier* (Cr. & P. 240) followed
See ACCUMULATIONS. [186

—— *Smurthwaite* v. *Hannay* ([1894] A. C. 494) followed - - - - 661
See PRIVY COUNCIL—PRACTICE.

—— *Tod & Son* v. *Merchant Banking Company* (10 Court Sess. Cas. 4th Series (Rettie), 1009) distinguished - - 56
See SCOTCH LAW. 6.

—— *Toulmin* v. *Steere* (3 Mer. 21 0) distinguished
See MORTGAGE. [11

—— *Western Counties Manure Company* v. *Lawes Chemical Manure Company* (L. R. 2 Ex. 218) commented on - - 154
See LIBEL.

—— *Wilson* v. *Wilson* (L. R. 2 P. & D. 422) approved - - - - 517
See PRIVY COUNCIL APPEALS—CEYLON. 1.

CEYLON, LAW OF.
See PRIVY COUNCIL APPEALS—CEYLON. 1, 2.

CHARITY—Gift to—Accumulations—Thellusson Act - - - - - 186
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—— Gift to—Presbyterian Church in Queensland—Effect of incorporation - 618
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—— Mortmain—Colonial will - - 89
See PRIVY COUNCIL APPEALS—VICTORIA. 3.

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—— **Art. 1927** - - - - - 318
See PRIVY COUNCIL APPEALS—CANADA. 5.

CIVIL PROCEDURE CODE OF LOWER CANADA, art. 997 - - - - - 282
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COLONIAL GOVERNMENT—Liability as bailees for hire—Negligence - - 632
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COLONIAL GOVERNMENT—*continued.*

—— Servants of—Office held during pleasure [229
See PRIVY COUNCIL APPEALS — WEST AUSTRALIA.

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See SCOTCH LAW. 7.

COMPANY—Colonial law—Authority to carry on business in Colony - - 606
See PRIVY COUNCIL APPEALS—CAPE OF GOOD HOPE. 1.

—— Power to charge uncalled capital—Law of New South Wales - - - 244
See PRIVY COUNCIL APPEALS — NEW SOUTH WALES. 3.

COMPENSATION—Canal company—Mines under or near a canal—Danger from working of mine - - - - 564
See CANAL.

CONFLICT OF LAWS—Mortmain—Colonial will [89
See PRIVY COUNCIL APPEALS—VICTORIA. 3.

COPYRIGHT—*Pictures—Infringement — Sketches from Living Pictures—Publication in Newspaper —Fine Arts Copyright Act*, 1862 (25 & 26 *Vict. c.* 68), *ss.* 1, 2, 6.] Observations upon the meaning of the terms "copy," "reproduction" and "colourable imitation" of an original picture "or of the design thereof," used in the Fine Arts Copyright Act, 1862 (25 & 26 Vict. c. 68), ss. 1, 6.—The decision of the Court of Appeal ([1894] 2 Ch. 1) affirmed on the ground that, looking at the variations between the original pictures and the sketches, the sketches were not in fact copies, reproductions, or colourable imitations of the original pictures or of the designs thereof and did not constitute an infringement of the copyright within the Act. HANFSTAENGL *v.* BAINES & CO. [20

COSTS—Due from guardians of the poor—Limitation of time for payment - 485
See POOR LAW.

CROWN—Action of ejectment by—Equitable defence - - - - 83
See PRIVY COUNCIL APPEALS—TRINIDAD.

—— Prerogative—Colonial servants of Crown 229
See PRIVY COUNCIL APPEALS — WEST AUSTRALIA.

CROWN LANDS—Law of New South Wales 425
See PRIVY COUNCIL APPEALS — NEW SOUTH WALES. 4.

DEFAMATION — Slander of goods — Special damage—Injunction - - 154
See LIBEL.

DESERTION—Divorce—Scotch law - - 384
See SCOTCH LAW. 2.

DIVORCE—*Alimony — Income of Respondent — Profits of Partnership Business — Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 32—*Matrimonial Causes Act*, 1866 (29 & 30 *Vict. c.* 32), *s.* 1.] Upon an application after a decree for dissolution of marriage for an order under

DIVORCE—*continued.*
sect. 32 of the Matrimonial Causes Act, 1857, that the husband should secure to the wife an annual sum of money, it appeared that he was partner in a brewery and was entitled to receive £200 per month in respect of his share of the profits, but could not draw anything more without the consent of his partner. His share of the profits had for several years past amounted to about £3300 a year, but he had received only the monthly allowance, amounting to £2400 a year, the rest being carried to his credit in the partnership books.—The Court of Appeal (reversing the decision of the President) held that, for the purpose of determining the amount of the annual payment to be secured to the wife, the husband must be treated as having only an income of £2400, and made an order that he should secure to her the yearly sum of £300 in addition to the yearly sum of £500 a year already secured to her by her marriage settlement.—Upon appeal to the House of Lords, their Lordships expressed their opinion that, having regard to the circumstances, an application for an order under sect. 1 of the Act of 1866 was the more appropriate proceeding, and ordered that the order appealed from should be reversed, and that the husband should under sect. 1, during the joint lives of himself and his wife, pay her £600 a year in monthly instalments. HANBURY *v.* HANBURY - - - 417

—— Scotch law—Desertion - - 384
See SCOTCH LAW. 2.

DOCKS—Poor-rate—Docks in different parishes
See POOR-RATE. 2. [136

DOMICIL—Matrimonial - - - 517
See PRIVY COUNCIL APPEALS—CEYLON. 1.

EASEMENT—Occupation for poor-rate - 117
See POOR-RATE. 1.

ECCLESIASTICAL LAW—Lower Canada—Parish—Canonical and civil jurisdiction [301
See PRIVY COUNCIL APPEALS—CANADA. 4.

EJECTMENT—Action by Crown—Equitable defence - - - - 83
See PRIVY COUNCIL APPEALS—TRINIDAD.

ENTAIL—Scotch Law—Direction to entail on heirs of another entailed estate - 507
See SCOTCH LAW. 1.

EQUITY OF REDEMPTION—Transfer of mortgage to owner of—Keeping security alive - - - - - 11
See MORTGAGE.

EVIDENCE—Testamentary capacity—New Trial [310
See PRIVY COUNCIL APPEALS—VICTORIA. 4.

FACTOR—*Sale of Goods, Agreement for—Possession of Goods under Agreement with option to buy—Hire and Purchase Agreement—Disposition of Goods by Person having option to Purchase—"Person having agreed to buy Goods"—Factors Act* 1889 (52 *&* 53 *Vict. c.* 45), *s.* 9.] The expression in the Factors Act 1889 s. 9 "a person having agreed to buy goods" means a person who has bound himself by agreement to buy, and does not include a person who has an option to buy, the owner being bound to sell if that option is exercised.—The owner of a piano agreed to let it on hire, the hirer to pay a rent by monthly instalments, on the terms that the hirer might terminate the hiring by delivering up the piano to the owner, he remaining liable for all arrears of hire; also that if the hirer should punctually pay all the monthly instalments, the piano should become his sole and absolute property, and that until such full payment the piano should continue the sole property of the owner. The hirer received the piano, paid a few of the instalments, and pledged it with a pawnbroker as security for an advance:—*Held*, that upon the true construction of the agreement the hirer was under no legal obligation to buy, but had an option either to return the piano or to become its owner by payment in full; that by putting it out of his power to return the piano he had not become bound to buy; that he had therefore not "agreed to buy goods" within the meaning of the Factors Act 1889 s. 9, and that the owner was entitled to recover the piano from the pawnbroker.—*Lee* v. *Butler* ([1893] 2 Q. B. 318) distinguished.—The decision of the Court of Appeal ([1894] 2 Q. B. 262) reversed and the decision of Lord Coleridge C.J. and Day J. restored. HELBY *v.* MATTHEWS - - 471

FORGED DEED—Mortgage by agent—Liability of principal - - - - 173
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FRAUD—Concealed—Statute of Limitations 495
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FREIGHT—Liability for—Receipt under bill of lading - - - - 40
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GAMING—Canadian law—Share-broking—Principal and broker - - - 318
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GENERAL LINE OF BUILDINGS—Street—Scotch law - - - - 666
See SCOTCH LAW. 4.

GOVERNOR-GENERAL OF CANADA—Appeal to - - - - - 202
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GUARANTEE—Scotch law - - - 354
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GUARDIANS OF THE POOR—Debt due from—Limitation of time for payment - 485
See POOR LAW.

HIGHWAY—Repairs—New South Wales 433
See PRIVY COUNCIL APPEALS—NEW SOUTH WALES. 5.

HIRING AGREEMENT—Option of purchase—Bankruptcy - - - - 457
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—— Option of purchase — "Person having agreed to buy goods"—Factors Act
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See DIVORCE.

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—— Scotch law - - - 371, 384
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INFORMATION — Lower Canada — Power of Attorney-General to discontinue - 282
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See LIBEL.

JAPAN, LAW OF - - - - 644
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JURISDICTION—Consular Courts in Japan — Counter-claim against Japanese plaintiff [644
See PRIVY COUNCIL APPEALS—CHINA SETTLEMENTS.

—— Canonical and civil—Lower Canada - 301
See PRIVY COUNCIL APPEALS—CANADA. 4.

LAND TAX—Law of Victoria—Apportionment [113
See PRIVY COUNCIL APPEALS—VICTORIA. 2.

LEASE—Improvements—Law of Cape of Good Hope - - - - 451
See PRIVY COUNCIL APPEALS—CAPE OF GOOD HOPE. 2.

LIBEL—*Slander of Goods of a Rival Trader—Disparagement without Special Damage—Injunction.*] An action will not lie for a false statement disparaging a trader's goods where no special damage is proved.—Where an action will not lie for defamation an injunction will not be granted.—*Quære*, whether an action will lie in any case for disparaging a trader's goods merely by stating that some other trader's goods are better, either generally or in this or that respect.—*Western Counties Manure Company* v. *Lawes Chemical Manure Company* (L. R. 9 Ex. 218) commented on.—*Evans* v. *Harlow* (5 Q. B. 624) approved.—The defendant sold the plaintiff's "Infants' Food," affixing to the plaintiff's wrappers a label stating that the defendant's "food for infants and invalid" was far more nutritious and healthful than any other. It was not proved that the statement was untrue or that it had caused any damage to the plaintiff:—*Held*,

LIBEL——*continued.*

reversing the decision of the Court of Appeal and restoring that of Romer J. ([1894] 3 Ch. 276), that no action would lie and that no injunction to restrain the defendant ought to be granted. WHITE *v.* MELLIN - - - - 154

LIMITATIONS, STATUTE OF—*Mortgage—Sale—Agent—Fraud—Constructive Notice—Trustee—Cause of Action, Commencement of—Trust Property or Proceeds "still retained"—Statute of Limitations* (21 *Jac.* 1, *c.* 16)—*Trustee Act* 1888 (51 *& 52 Vict. c.* 59), *s.* 8.] If fraud or a non-discovery of fraud is to be relied on to take a case out of the Statute of Limitations, it must be the fraud of, or in some way imputable to, the person who invokes the aid of the statute.—In 1878 the respondents, as first mortgagees, sold the property under their power of sale, employing S., who was also the mortgagor's solicitor, to conduct the sale. S. received the sale moneys, and after satisfying the respondents' mortgage, kept the balance for himself instead of paying off the second mortgagee. S. did not inform the second mortgagee of the sale but—acting as the mortgagor's solicitor—continued to pay him interest on the second mortgage as if it were still subsisting. Until 1892 the respondents either did not know that there was a second mortgage or believed a false representation made to them by S. that he had the authority of the second mortgagee to receive the balance. In 1892 the second mortgagee discovered the fraud and brought an action against the respondents for an account and payment of the amount due to him:—*Held*, that the action was barred by the Statute of Limitations and sect. 8 of the Trustee Act 1888; that the case did not fall within either of the exceptions mentioned in sect. 8; that the respondents were not "party or privy" to the fraud of S., and that the trust moneys were not "still retained" by them, the moneys not being in their hands or under their control when the action was brought; that in committing and concealing the fraud S. was not acting as the respondents' agent, and that there was nothing to prevent the Statute of Limitations from beginning to run in 1878.—*Quære*, whether the knowledge acquired by S. as the mortgagor's solicitor was constructive notice to the respondents of the existence of the second mortgage, so as to make them trustees for the second mortgagee.—The decisions of Romer J. ([1893] 3 Ch. 530) and the Court of Appeal ([1894] 1 Ch. 599) affirmed. THORNE *v.* HEAD & MARSH - - - - - 495

LOCAL GOVERNMENT—*Rates—Lighting Rate—Coal Mines—"Land"—"Houses, Buildings and Property other than Land"—Poor Relief Act* 1601 (43 *Eliz. c.* 2) *s.* 1—*Lighting and Watching Act* 1833 (3 *& 4 Wm.* 4 *c.* 90) *s.* 33.] For the purposes of a rate under the Lighting and Watching Act 1833 (3 & 4 Wm. 4 c. 90) coal mines are not "land" but are "property (other than land) rateable to the relief of the poor" within the meaning of sect. 33, and are therefore rateable on the higher scale, though they cannot derive any benefit from the rate. The decision of the Court of Appeal ([1894] 2 Q. B. 11) affirmed. THURSBY *v.* CHURCHWARDENS, &C., OF BRIERCLIFFE-WITH-EXTWISTLE - - - - 32

LOCAL GOVERNMENT—*continued.*
—— Scotch law—Regular line of street - 666
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MALA FIDES—Indirect motive—Interference with watercourse - - - 587
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MANITOBA, LAW OF - - - 202
See PRIVY COUNCIL APPEALS—CANADA. 1.
MARRIAGE CONTRACT—Scotch Law - 371
See SCOTCH LAW. 3.
MINE—Coal mine—Lighting rate—Property other than land - - - 32
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—— Near canal—Right of support—Compensation for not working - - 564
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MISJOINDER—Plaintiffs—Admiralty Court 661
See PRIVY COUNCIL—PRACTICE.
MORTGAGE—*Purchase of Equity of Redemption—Transfer of Mortgage to Owner of Equity of Redemption—Intention to keep Security alive.*] Where the owner of an equity of redemption pays off a mortgagee and takes an assignment of the mortgage, and the documents or circumstances shew an intention to keep alive the security, it is not extinguished but enures for the benefit of the owner of the equity of redemption. *Adams* v. *Angell* (5 Ch. D. 634) approved. *Toulmin* v. *Steere* (3 Mer. 210) distinguished and reflected on. THORNE *v.* CANN - - 11
—— Agent exceeding his authority—Liability of principal - - - - 173
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See PRIVY COUNCIL APPEALS—VICTORIA. 3.

NATAL, LAW OF.
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NAVIGABLE RIVER—Law of Lower Canada—Riparian owner - - - 237
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NEW SOUTH WALES, LAW OF.
See Cases under PRIVY COUNCIL APPEALS—NEW SOUTH WALES.
NEWSPAPER—Publication of sketches in—Tableaux vivants—Copyright - 20
See COPYRIGHT.
NOTICE—Abating nuisance—Overhanging trees
See NUISANCE. [1
NUISANCE—*Trees overhanging Neighbour's Land for more than Twenty Years—Right to abate Nuisance without Notice.*] The owner of land which is overhung by trees growing on his neighbour's land is entitled, without notice, if he does not trespass on his neighbour's land, to cut the branches so far as they overhang, though they have done so for more than twenty years. The decision of the Court of Appeal ([1894] 3 Ch. 1) affirmed. LEMMON v. WEBB - - 1
OCCUPATION—Poor-rate - - 117, 136
See POOR-RATE. 1, 2.
OPTION OF PURCHASE—Hiring agreement—Bankruptcy - - - 457
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—— Hiring agreement—Pledge—Factors Act
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ORDINANCE—Universities' Commissioners—Scotland—Laying before Parliament
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PARISH—Lower Canada—Canonical and civil jurisdiction - - - 301
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PARTIES—Misjoinder of plaintiffs—Admiralty Court - - - - 661
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PARTNERSHIP—Business in England and the Colonies—Probate duty—Local situation of assets - - - - 251
See PRIVY COUNCIL APPEALS—VICTORIA. 1.
—— Profits of—Alimony to divorced wife 417
See DIVORCE.
PATENT—*Prolongation—Patent Law Amendment Act*, 1852, *s.* 25—*Patents, Designs, and Trade Marks Act*, 1883, *s.* 25 (4)—*Extension of Patent after Foreign Patent had Lapsed.*] Where a British patent granted before the passing of the Patents, Designs, and Trade Marks Act, 1883, was prior in date to patents for the same foreign invention obtained by the same patentee in seven foreign countries, five of which were still in force, but two of which had lapsed owing to non-performance of the condition of grant:—*Held*, that, according to the rule laid down in sect. 25, sub-sect. 4, of the Act of 1883 (sect. 113 of which repealed sect. 25 of the Patent Law Amendment Act, 1852), the Committee had a discretion to extend the patent whether or not it had been the first granted, with due regard to the circumstances connected with the foreign patents.—Extension granted, as the evidence did not suggest that the inhabitants of the United Kingdom would be prejudicially affected thereby in their foreign competition. *In re* SEMET AND SOLVAY'S PATENT - 78
—— Infringement—Law of Ceylon - 446
See PRIVY COUNCIL APPEALS—CEYLON 2.

2. —— *Prolongation—Petition by Assignee of Inventor.*] An extension of a patent will not be granted to the assignee of an inventor unless the inventor would himself have been entitled thereto, and will himself derive benefit directly or indirectly therefrom. *In re* BOWER-BARFF PATENT - - - - - 675
PERCOLATION—Underground water - 587
See WATERCOURSE.
PICTURES—Copyright in—Tableaux vivants 20
See COPYRIGHT.
PLEDGE—Person who has agreed to buy goods—Option of purchase—Factors Act
See FACTOR. [471
—— Scotch law—Redelivery to pledgor for a limited purpose - - - 56
See SCOTCH LAW. 6.

POOR LAW—*Guardians—Limitation of Time for Payment of Debt—"Commencement of Proceedings before competent Authority"—Application for Taxation of Costs—"Debt, Claim or Demand incurred or become due"—Poor Law (Payment of Debts) Act*, 1859 (22 & 23 *Vict. c.* 49) *ss.* 1, 4.] The Poor Law (Payment of Debts) Act 1859 enacts by sect. 1 that "any debt, claim or demand lawfully incurred or become due" from the guardians of any union shall be paid within the half-year in which the same shall have been incurred or become due, or within three months after the expiration of such half-year, but not afterwards. Sect. 4 provides that if any person claiming any debt or demand shall "commence proceedings in any Court of Law or Equity, or before any justice or other competent authority" within the time thereinbefore limited, and shall with due diligence prosecute such proceedings to judgment or other final settlement of the question, such judgment shall be satisfied by the guardians, notwithstanding that such judgment may be recovered or such final settlement arrived at after the expiration of the period thereinbefore provided. An appeal to quarter sessions against an assessment to the poor-rate having been allowed with costs, the appellants, within the three months limited by sect. 1, applied to the clerk of the peace to tax the costs. The costs were taxed after the expiration of the three months, and no proceedings to enforce payment of the taxed amount were commeneed by the appellants within the three months after the expiration of the half-year in which the costs were taxed:—*Held*, that the application to tax was not a commencement of proceedings within the meaning of sect. 4, and that the appellants could not recover the costs. *Quære*, whether before taxation of the costs there was "any debt, claim or demand incurred or become due." The decision of the Court of Appeal ([1895] 1 Q. B. 357) affirmed. MIDLAND RAILWAY COMPANY *v.* EDMONTON UNION - 485

POOR-RATE—*Rateable Occupation—Easement—Tunnel—Occupation not Exclusive, but Paramount.*] Land may be occupied for the purpose of and in connection with the enjoyment of an easement in such a manner as to make the person so occupying rateable to the relief of the poor. Such a person may be rateable, though his occupation is exclusive only for certain purposes, and though the owner of the soil has reserved to himself rights of possession subordinate to the paramount right granted to the other. The test of rateability is not whether the rights granted are corporeal or incorporeal, but whether there is an occupation—which is a question of fact. Where in pursuance of a statute the owner of land granted to a drainage company the exclusive right of drainage through a tunnel and a watercourse in his land, with the right of placing works in the tunnel and watercourse, and of making other tunnels in connection therewith, reserving to himself mineral and other rights:—*Held*, reversing the decision of the Court of Appeal, that the statute and grant gave the company not merely an easement but possession of the tunnels and watercourse, that the rights reserved to the owner were subordinate to the rights granted to the company, and that the company were de facto

POOR-RATE—*continued.*

in occupation of the tunnels and watercourse and rateable to the poor in respect thereof. HOLYWELL UNION AND HALKYN PARISH *v.* HALKYN DRAINAGE COMPANY - - - - 117

2. —— *Rateable Value — Docks — Docks in several Parishes—Dock Dues—Assessment, Principle of whether Parochial or Proportional—Dock Railways—Incapacity to charge Tolls—Beneficial Occupation—Annual Value—Hypothetical Tenant* (6 & 7 *Will.* 4, *c.* 96), *s.* 1.] In assessing to the poor-rate docks which extend over more than one parish the rateable value should, wherever it is possible, be ascertained by attributing to each parish the receipts earned and the expenses incurred in that parish, and not by obtaining a rateable value for the whole of the docks and then allocating this value to each parish in proportion to the water area of the docks in that parish.—This principle held applicable to the docks at Kingston-upon-Hull, and the decision of the Court of Appeal ([1894] 2 Q. B. 69) affirmed on this point.—*Mersey Docks* v. *Liverpool* (L. R. 7 Q. B. 643) approved, and *Reg.* v. *Hull Dock Company* (18 Q. B. 325) commented on.—Railway and tramway lines formed part of a dock system, and the dock company were prohibited by statute from taking any tolls for the use of the lines. A tenant could be found who would pay a rent for the lines if such rent could be legally exacted by the dock company:—*Held*, that since no rent could be earned by the dock company because of the statutory prohibition, the rent which could have been earned but for that prohibition ought not to be taken into consideration in determining the rateable value of the dock company's property, and that this was quite consistent with the decision in *London County Council* v. *Churchwardens, &c., of Erith*) [1893] A. C. 562, 592).—The decision of the Court of Appeal reversed on this point. SCULCOATES UNION *v.* DOCK COMPANY AT KINGSTON-UPON-HULL - - - 136

POWER OF ATTORNEY—Construction of law of Lower Canada - - - 612
See PRIVY COUNCIL APPEALS—CANADA. 7.

PRACTICE — Lower Canada — Information — Power of Attorney-General to discontinue - - - - - 282
See PRIVY COUNCIL APPEALS—CANADA. 6.

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PREROGATIVE OF CROWN—Colonial servant—Office held during pleasure - 229
See PRIVY COUNCIL APPEALS — WEST AUSTRALIA.

PRINCIPAL AND AGENT—*Excess of Authority—Liability of Principal—Mortgage—Authority to pledge Title-Deeds for a particular Sum—Forged Deeds—Redemption.*] Where a principal entrusts an agent with securities and instructs him to raise a certain sum upon them, and the agent borrows a larger sum upon the securities and fraudulently appropriates the difference (the lender acting bonâ fide and in ignorance of the limitation), the principal cannot redeem the securities without paying the lender all he has

PRINCIPAL AND AGENT—*continued.*
lent, although the agent has obtained the loan by fraud and forgery, and although the lender did not know that the agent had authority to borrow at all, and made no inquiry.—*Perry-Herrick* v. *Attwood* (2 De G. & J. 21) followed.—The decision of the Court of Appeal ([1893] 3 Ch. 130) affirmed. BROCKLESBY *v.* TEMPERANCE BUILDING SOCIETY - - - - 173

—— Construction of power of attorney—Law of Lower Canada - - - 612
See PRIVY COUNCIL APPEALS—CANADA. 7.

PRINCIPAL AND SURETY — Scotch law — Guaranty - - - - - 354
See SCOTCH LAW. 5.

PRIVY COUNCIL APPEALS—CANADA—*Manitoba—Dominion Statute*, 33 *Vict. c.* 3, *s.* 22, *subss.* 2, 3—*Manitoba Public Schools Act*, 1890—*Appeal to the Governor-General in Council—Remedies against Provincial Legislation.*] Where the Roman Catholic minority of Manitoba appealed to the Governor-General in Council against the Manitoba Education Acts of 1890, on the ground that their rights and privileges in relation to education had been affected thereby:—*Held*, reversing the judgment of the Supreme Court on a case submitted to it:—(*a*) That such appeal lay under sect. 22, sub-sect. 2, of the Manitoba Act, 1870, which applies to rights and privileges acquired by legislation in the province after the date thereof.—(*b*) That the Roman Catholics having acquired by such legislation the right to control and manage their denominational schools, to have them maintained out of the general taxation of the province, to select books for their use, and to determine the character of the religious teaching therein, were affected as regards that right by the Acts of 1890, under which State aid was withdrawn from their schools, while they themselves remained liable to local assessment in support of non-sectarian schools to which they conscientiously objected.—(*c*) That the Governor-General in Council has power to make remedial orders in the premises within the scope of sub-sect. 3 of sect. 22—*e.g.*, by supplemental rather than repealing legislation. BROPHY *v.* ATTORNEY-GENERAL OF MANITOBA - - - 202

2. —— *Quebec—Canadian Railway Act*, 1888 (51 *Vict. c.* 29)—*Award — Appeal under s.* 161, *sub-s.* 2—*Review of Award by the Court.*] Where an award of compensation made in an arbitration under the Canadian Railway Act, 1888 (51 Vict. c. 29), was appealed from under sect. 161, sub-sect. 2:—*Held*, that the Court rightly exercised its jurisdiction by reviewing the award as if it had been the judgment of a subordinate Court; that is by deciding whether a reasonable estimate of the evidence had been made. It was not authorized by the section to disregard the award and deal with the evidence de novo as if it had been a Court of first instance. ATLANTIC AND NORTH-WEST RAILWAY COMPANY *v.* WOOD 257

3. —— *Quebec—Bankers—Bank Act*, 18 *Vict. c.* 202 (*Canada*)—*Company not bound to see to Execution of Trust—Registration of Transfer of Shares—Notice of Trust.*] Where the respondent bank (incorporated by 18 Vict. c. 202), registered

PRIVY COUNCIL APPEALS—CANADA—*contd.*
an absolute transfer of its shares which had been executed by trustees and executors under a will to one of the residuary legatees, regardless of a provision in the will directing the substitution of the legatee's lawful issue at his death, and the transferee disposed of the shares so as to defeat the rights of the issue:—*Held*, that such registration, unless with actual knowledge of a breach of trust, was not wrongful, having regard to sect. 36 of the Act, which enacts that the bank is not bound to see to the execution of any trusts express, implied, or constructive to which any of its shares may be subject.—Notice that the shares were held by the trustees and executors in trust; possession by the bank of a copy of the will; the facts that transfers of other of its shares by the same trustees to other residuary legatees contained notice of substitution, that the president of the bank was also an executor of the will, and that the law agent of the bank was also law agent of the executors: *held* to be insufficient to affect the bank with the knowledge of the particular trusts sought to be enforced. SIMPSON *v.* MOLSONS' BANK - - - - 270

4. —— *Quebec—Canonical and Civil Jurisdiction as to Creation of Parishes—Jurisdiction of Civil Court—Revised Statutes of Quebec, ss.* 3373, 3380.] *Held*, that under Revised Statutes of Quebec, tit. ix., c. 1, every decree for the canonical erection of a new parish which is valid according to ecclesiastical law is a sufficient foundation for proceedings with the view of obtaining the civil recognition of that parish. No objection thereto can be taken on the ground of antecedent irregularity of procedure.—Proceedings before the Commissioners of the diocese with a view to such civil recognition are not subject to the review or control of a Court of justice.—An objection to the formation of a new parish, on the ground that one of the old parishes dismembered for that purpose was in debt, is valid under sect. 3380 of Revised Statutes of Quebec; but where the debt relied on was contracted by the Fabrique, it must be proved that the Fabrique was unable to pay it, and that a levy on the Roman Catholic freeholders of the parish has been duly authorized. ALEXANDRE *v.* BRASSARD [301

5. —— *Quebec — Gaming — Civil Code, Art.* 1927—8 & 9 *Vict. c.* 109—*Alleged Gambling Transactions—Principal and Broker—Practice—Costs.*] Art. 1927 of the Civil Code does not differ substantially from 8 & 9 Vict. c. 109, s. 18, and renders null and void all contracts by way of gaming and wagering.—A broker was employed to make actual contracts of purchase and sale, in each case completed by delivery and payment, on behalf of a principal whose object was not investment but speculation:—*Held*, that these were not gaming contracts within the meaning of the Code.—Costs of both parties directed to be paid by the successful appellant, special leave having been given to him under special circumstances notwithstanding the small amount at stake. FORGET *v.* OSTIGNY - - - 318

6. —— *Quebec—Information—Art.* 997, *Code of Civil Procedure—Power of Attorney-General to discontinue—General Railway Act, c.* 109 *of the*

PRIVY COUNCIL APPEALS—CANADA—*contd.*
Revised Statutes of Canada, 1888, *s.* 12.] Art. 997 of the Civil Procedure Code relates on its true construction, not to every illegal act done by an association therein mentioned, but only to such acts as are professedly or manifestly done in the assertion of some special power, franchise, or privilege not conferred upon it by law.—Where an information under that article alleged that the respondent company had closed a public lane under the pretext that they had acquired private interests therein which entitled them so to do, *held*, that this did not amount to an allegation that they closed it in the exercise of any power, franchise or privilege within the meaning of the article:—*Held*, also, that the Court has jurisdiction under art. 998 to prohibit the issue of a writ of information under art. 997; but that after issue the Attorney-General is dominus litis, and can discontinue proceedings or control their conduct and settlement independently of any private relator:—*Held*, that, assuming the lane in question to have been a public one, the respondent company were entitled to close, occupy, and use it with the assent of the city council, which assent was empowered by sect. 12 of the General Railway Act, c. 109 of the Revised Statutes of Canada, 1888. CASGRAIN *v.* ATLANTIC AND NORTH-WEST RAILWAY COMPANY - - 282

7. —— *Quebec—Principal and Agent — Construction of Power of Attorney—"Son procureur général et spécial"—Liability of Principal—Civil Code, art.* 181.] Where by a document indorsed "procuration générale et spéciale" a wife being sole owner constituted her husband "son procureur général et spécial" to administer her affairs, specifying such acts as drawing bills of exchange and making promissory notes:—*Held*, that the wife's liability extended to all promissory notes granted by the husband, and was not limited by art. 181 of the Civil Code to such notes as were required for the purposes of the administration. BANQUE D'HOCHELAGA *v.* JODOIN - - 612

8. —— *Quebec—Riparian Proprietor—Navigable River — Sale of Water-Power artificially created.*] A riparian proprietor, notwithstanding that the river is navigable, can acquire an interest in its water-power, as derived from a reservoir artificially formed by a dam across its channel, and sell the same along with and as appurtenant to his land. Even if such sale should not be effectual against the public, the vendor cannot himself impeach it on that ground:—*Held*, in this case, that as the vendor of a specified amount of water-power had not reserved to himself a right to a supply either pari passu with or preferably to the purchaser, the latter was entitled to damages in respect of any loss incurred by the vendor's user of the water in diminution of the amount sold. HAMELIN *v.* BANNERMAN - 237

PRIVY COUNCIL APPEALS—CAPE OF GOOD HOPE—*Company—No.* 3 *of* 1864, *Sched.* 17, *s.* 2, *head B—Construction—Authority of a company "to carry on business in the colony"—Licence.*] Where a company was authorized by its memorandum of association to carry on its business in any part of the world:—*Held*, that it was not taxable under No. 3 of 1864, Sched. 17, s. 2, head (*b*), which, on its true construction, relates to companies, some of whose dealings are specifically authorized "to be carried on in this colony." —*Colonial Government* v. *British South Africa Company* (9 Juta, 280) approved. MARSHALL *v.* ORPEN - - - - - - 606

2. —— *Lease — Improvements — Permanent Buildings erected by Lessee—Right of Removal.*] Where a lessee being entitled by the terms of his lease to remove all such improvements as should be capable of removal without injury to the land itself, pulled down a brick building which he had erected on the land demised and removed the materials except those composing the stone foundations beneath the soil:—*Held*, that this proceeding was authorized by the lease, and in accordance with the lessee's common law right under the Roman-Dutch law. LONDON AND SOUTH AFRICAN EXPLORATION COMPANY *v.* DE BEERS CONSOLIDATED MINES - - 451

PRIVY COUNCIL APPEALS—CEYLON—*Matrimonial Law—Foreign Domicil—Divorce Jurisdiction—Matrimonial Domicil.*] The matrimonial law applicable to British or European residents in Ceylon is the Roman-Dutch law as it existed in the Colony at the date of the Royal Proclamation of the 23rd of September, 1799; and that law did not contain any rule specially conferring on the local Courts divorce jurisdiction a vinculo over European spouses resident in the island, but whose marriage and domicil were in England.—*Held*, further, that the permanent domicil of the spouses within the territory is necessary to give to its Courts jurisdiction so to divorce a vinculo as that its decree to that effect shall by the general law of nations possess extra-territorial authority. A so-called "matrimonial domicil" said to be created by a bonâ fide residence of the spouses within the territory, of a less degree of permanence than is required to fix their true domicil, cannot be recognised as creating such jurisdiction.—*Wilson* v. *Wilson* (L. R. 2 P. & D. 442) approved. LE MESURIER *v.* LE MESURIER [517

2. —— *Patent for Improvements in an Old Machine—Infringement.*] Where a patent had been granted merely for improvements upon the mechanism of an old and known machine:—*Held*, that the patentee's exclusive right thereto could not be permitted to exceed the exact terms of his specification; and that the defendants' improvements which had the same object, but were effected in a manner not strictly corresponding to the specification, were not an infringement of his patent. BROWN *v.* JACKSON - - - 446

PRIVY COUNCIL APPEALS—CHINA SETTLEMENTS—*Jurisdiction of Consular Courts in Japan —Counter-claim against Japanese Plaintiff—Jurisdiction of Consular and Territorial Courts under International Treaties.*] By virtue of treaties between Great Britain and Japan the Consular Courts of the former country and the territorial Courts of the latter country have exclusive jurisdiction over claims against British and Japanese subjects respectively.—Accordingly, it would be in excess of the jurisdiction granted to the British Consular Court if it were to entertain by way of

PRIVY COUNCIL APPEALS—CHINA SETTLEMENTS—*continued.*

counter-claim or cross-action a claim by a British defendant against a Japanese plaintiff. The cognizance of such claim belongs to the territorial Courts.—The respondent company, being sued by the Emperor of Japan in a British Court for damages resulting from a maritime collision, counter-claimed in respect of the same collision as due to the negligence of the plaintiff's servants:—*Held*, that the counter-claim could not be entertained. IMPERIAL JAPANESE GOVERNMENT *v.* PENINSULAR AND ORIENTAL STEAM NAVIGATION COMPANY - - - - 644

PRIVY COUNCIL APPEALS—NATAL—*Speculative Transactions in Shares—Anonymous Associations or Syndicates.*] The law of Natal does not render it illegal for any person or association to buy and sell shares as a speculation. Where an association formed for that purpose, including the appellant, bought from and sold to other associations of which the appellant was not a member, though some of his associates were:—*Held*, that such dealings by the appellant's association, even though disadvantageous to the appellant as compared with his associates or some of them, was not necessarily beyond the authority of its manager; which authority, having regard to the nature of the enterprise and to the understanding between the parties as implied from the course of business, was not limited to transactions in the open market. LAUGHTON *v.* GRIFFIN 104

PRIVY COUNCIL APPEALS — NEW SOUTH WALES—*Bill of Sale of all the Debtor's Property—Delay in Possession and Registration—Validity of Bill of Sale—Bankruptcy Act*, 1887 (51 *Vict. No.* 19), *ss.* 4, 52.] Where the appellant advanced money in good faith to a person who appeared to be solvent, taking a bill of sale which included all the debtor's stock in trade, book debts and other property, but without taking delivery or registering the bill of sale until just in time to prevent its being avoided under the Bills of Sale Act:—*Held*, that his title thereunder prevailed against the debtor's official assignee, no intent being shewn to have existed at the date thereof to defeat or delay creditors. MORRIS *v.* MORRIS [625

2. —— *Company — Arbitration — Reference of Suit against a Company*—37 *Vict. No.* 19, *s.* 113—55 *Vict. No.* 32, *s.* 12.] *Held*, that the arbitration provisions in the Companies Act (37 Vict. No. 19), only apply to voluntary arbitrations to which a company has submitted by writing under its common seal, not to references under sect. 12 of the Arbitration Act, 1892. Accordingly, an arbitrator under the later Act need not make the declaration before a justice prescribed by sect. 113 of the earlier Act. ZELMA GOLD MINING COMPANY *v.* HOSKINS - - - - 100

3. —— *Company*—37 *Vict. No.* 19—*Power of Company to create a First Charge on its Uncalled Capital.*] Under New South Wales Act, 37 Vict. No. 19 (which for the purposes of this case is identical with the English Companies Act, 1862), a company limited by shares can create a charge upon its uncalled capital so as to confer priority in the winding-up. *In re Pyle Works* (44 Ch. D. 534) approved. Where the memorandum of association authorized the giving any security of any description for money, *held* that this authorized a charge upon the whole uncalled capital in the absence of any article excluding any part thereof from its operation. NEWTON *v.* DEBENTURE-HOLDERS, &C., OF ANGLO-AUSTRALIAN INVESTMENT COMPANY - - - - 244

PRIVY COUNCIL APPEALS — NEW SOUTH WALES—*continued.*

4. —— *Crown Lands Alienation Act*, 1861, *s.* 22—48 *Vict. No.* 18, *s.* 2, *sub-s.* (*b*); *s.* 42—*Right to make Additional Conditional Purchases.*] Where the appellant effected a conditional purchase under sect. 22 of the Crown Lands Alienation Act, 1861, of land adjoining to Crown land which had been previously granted to him in fee simple under sect. 25:—*Held*, that he did not become thereby a holder of an original conditional purchase within the meaning of sect. 42 of 48 Vict. No. 18, so as to obtain the right to make additional conditional purchases under that section:—*Held*, further, that even if sect. 22 of the repealed Act of 1861 did confer upon him as the fee-simple holder of land the right claimed, sect. 2, sub-sect. (*b*), of the later Act was inoperative to preserve such right. The mere right, existing at the date of a repealing statute, to take advantage of provisions of the statute repealed is not a "right accrued" within the meaning of the usual saving clause. ABBOTT *v.* MINISTER FOR LANDS - - - - 425

5. —— *Non-repair of Public Ways*—43 *Vict. No.* 3, *s.* 67—*Action for Damages.*] *Held*, that the appellants were not liable in damages to the respondent in consequence of their non-repair of the roads vested in them by 43 Vict. No. 3. No statutory obligation in that respect had been imposed upon them, and no right of action had been conferred on the respondent.—*Borough of Bathurst* v. *Macpherson* (4 App. Cas. 256) explained as enforcing liability in respect of misfeasance in causing a nuisance in a highway.—*Cowley* v. *Newmarket Local Board* ([1892] A. C. 345) followed as establishing the principle that an action for damages will not lie for non-repair even in cases where non-repair constitutes an indictable breach of duty. *Hartnall* v. *Ryde Commissioners* (4 B. & S. 361) overruled. MUNICIPAL COUNCIL OF SYDNEY *v.* BOURKE - - 433

6. —— *Will—Residuary Clause—Construction—Referential Trusts do not duplicate Charges.*] Trusts of residue created by reference to other trusts are not to be read as creating a duplication of charges on the estate in the absence of the testator's clear intention to that effect.—*Hindle* v. *Taylor* (5 D. M. & G. 577) approved. Where a testator gave to his widow the interest of £20,000 during widowhood, and on re-marriage the interest of £10,000 for her life, the interest on the balance of the £20,000 to be in that case for the benefit of their children; "and as to all his residuary estate" gave it upon the same trusts as were declared in regard to the £20,000, and the widow re-married:—*Held*, that the residuary clause did not operate to give to her either the income for life of a moiety of the residuary estate or of an additional £10,000. TREW *v.* PERPETUAL TRUSTEE COMPANY - - - - 264

PRIVY COUNCIL APPEALS—QUEENSLAND—*Bailment—Liability of Government as compulsory Bailees for Hire—Negligence of Bailee—Volenti non fit injuria—Queensland Navigation Act*, 1876 (41 *Vict. No.* 3)—*Queensland Customs Act*, 1873 (37 *Vict. No.* 1), *s.* 103.] Where the Government, being bailees for hire, stored the appellants' explosive goods in sheds near to the water-edge:—*Held*, that the selection of such a site rendered it incumbent upon them to place the goods at such a level as would in all probability ensure their absolute immunity from the incursion of flood water; that the appellants were entitled to rely on the care and skill of their bailees, and could not be said to have accepted any risks of defective storage with which they had made themselves acquainted. Case remanded for a new trial, to ascertain whether the Government negligently stored the goods at too low a level, or whether, on the advent of the floods, they failed to take reasonable and proper measures for saving the goods, or part thereof. Decisions that public bodies are not liable to individuals for nonfeasance have no application where the public body is under contract with the individual for remuneration. BRABANT & CO. *v.* KING - - 632

2. —— *Charity—Religious Educational and Charitable Institutions Act of* 1861, *s.* 3—*Validity of Charitable Gift — Effect of Incorporation.*] Where a bequest was made in favour of St. Paul's Church and its congregation, and it appeared that that congregation had voluntarily joined the Presbyterian Church of Queensland, an ecclesiastical body which had been incorporated through its officers under the Religious Educational and Charitable Institutions Act of 1861:—*Held*, that the congregation, having regard to the terms of incorporation, had become, by virtue of their union, constituent members of the Church, so that a bequest in their favour was in reality a bequest to the incorporated body, and was accordingly invalidated, not having been registered or attested in the mode prescribed by the Act.—Sect. 3 of the Act applies to every gift which increases the resources of the incorporated body, although not in terms in its favour, and although trustees other than its own are selected as donees. MCSWAINE *v.* LASCELLES - - - 618

PRIVY COUNCIL APPEALS — TRINIDAD — *Action of Ejectment by the Crown—Equitable Defence—Specific Performance.*] In an action of ejectment by the Crown a defendant may set up any equitable defence which would have availed against a private plaintiff.—Judgment held to have been rightly entered for the defendant, where a concluded contract with the Crown was proved entitling him to the issue of a grant in respect of the land in suit. ATTORNEY-GENERAL FOR TRINIDAD AND TOBAGO *v.* BOURNE - - 83

PRIVY COUNCIL APPEALS—VICTORIA—*Administration and Probate Act*, 1890—*Local situation of Testator's Assets—Partnership Business in the Colony distinct from the General Business of the Firm.*] Where a firm carried on businesses in London, Melbourne, and Adelaide, which were severally treated as distinct in the partnership agreement, and also in the accounts and mode of conducting the same:—*Held*, that the interest of a deceased partner in the business carried on at Melbourne was locally situate in the Colony of Victoria so as to be liable to probate duty in respect of his will. BEAVER *v.* MASTER IN EQUITY OF SUPREME COURT OF VICTORIA - - 251

PRIVY COUNCIL APPEALS — VICTORIA — *continued.*

2. —— *Land Tax Acts—Purchaser of Lot less than* 640 *Acres—Vendor's Claim to Proportionate Land Tax.*] Where the respondent had contracted to purchase from the appellants less than the 640 acres which is the minimum quantity of land liable to land tax under the Land Tax Act, 1877:—*Held*, that the appellants were not entitled on completion to charge the respondent with the land tax thereon from the date of his possession, either as his proportionate part of the tax paid by themselves on their entire holding, or as an outgoing contracted to be paid for in respect of his purchase. COUNTRY ESTATES COMPANY *v.* GRAVES [113

3. —— *Law of Mortmain*—51 *&* 52 *Vict. c.* 42 *—Gift of Money by Colonial Will to be invested in Land in England.*] 51 & 52 Vict. c. 42, which consolidates the Mortmain Acts, and in effect prohibits the gift of money by English wills to be invested in land in England for charitable purposes, does not apply to colonial wills.—Where a domiciled Victorian by will gave money to an English corporation for the purchase of land in England for charitable purposes:—*Held*, that the gift was governed wholly by the law of Victoria, and being valid by that law, bound the executors to pay the legacy to the corporation.—*Attorney-General* v. *Mill* (2 Dow. & Cl. 393) distinguished as relating to an English will. MAYOR, &C., OF CANTERBURY *v.* WYBURN - - - 89

4. —— *Testamentary Capacity — Verdict against Weight of Evidence—New Trial ordered —Issue as to Testator's Capacity.*] In a suit to revoke probate of a will the jury found by a majority that the testator was of unsound mind at the date of its execution:—*Held*, reversing an order of the Full Court, that the verdict must be set aside as against the weight of evidence; the medical evidence being insufficient to support it, while the other evidence of incapacity related to irrelevant circumstances, and was contradicted by witnesses who deposed to actual transactions with the testator, and to his conduct and condition at the time of executing his will. AITKEN *v.* MCMECKAN - - - - - 310

PRIVY COUNCIL APPEALS — WEST AUSTRALIA—*Prerogative of the Crown—Petition of Right—Colonial Servants of the Crown hold Office during Pleasure.*] A Colonial Government is on the same footing as the Home Government as to the employment and dismissal of servants of the Crown; and in the absence of special contract they hold their offices during the pleasure of the Crown.—Where the respondent, having been gazetted, without any special contract, to act temporarily as medical officer during the absence on leave of the actual holder of that office, was dismissed by the Government before the leave had expired:—*Held*, that he had no cause of action. SHENTON *v.* SMITH - - - - 229

PRIVY COUNCIL—PRACTICE—*Admiralty Court —Suit under* 9 *&* 10 *Vict. c.* 93—*Misjoinder of*

PRIVY COUNCIL—PRACTICE—*continued.*

Plaintiffs — Misjoinder of Causes of Action.] In a suit under Lord Campbell's Act numerous plaintiffs sought to recover separate damages as due to each plaintiff or group of plaintiffs for injuries resulting from a maritime collision alleged to have been caused by the negligence of the appellants:—*Held*, that there was no authority expressed in or to be implied from the rules of Court to warrant the joinder in one suit of different and distinct causes of action not being causes of action by and against the same parties. *Smurthwaite* v. *Hannay* ([1894] A. C. 494) followed. PENINSULAR AND ORIENTAL STEAM NAVIGATION COMPANY *v.* TSUNE KIJIMA - 661

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QUEENSLAND, LAW OF - - 618, 632
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RAILWAY—*Construction of Local and Personal Act—Forwarding of Traffic—Statutory Obligation enforceable by Public—Group Rates—Railway and Canal Traffic Act* 1888 (51 & 52 *Vict.* c. 25), *s.* 29.] A clause in a railway company's special Act limiting the rates for certain traffic—the result of a parliamentary contest between two railway companies—has the effect, not merely of a contract between the two companies, but of a statutory obligation which may be enforced by any person chargeable with the rates for such traffic.—The B. Railway Company promoted a Bill in Parliament to give them (inter alia) running powers over part of the T. Railway Company's system with which the B. Company's line formed junctions. The Bill was passed into an Act without the running powers but with a clause enacting that the T. Company should forward traffic destined for or coming from the B. Company's line, at rates per mile not greater than the lowest rate which should for the time being be charged by the T. Company for like traffic between certain places. The T. Company forwarded coal for the appellants destined for the B. Company's line, charging rates in excess of the limit imposed by that clause in the B. Company's Act, but within the maximum allowed by the T. Company's special Acts, and sued the appellants for the amount:—*Held* (Lord Morris dissenting), that the obligations imposed by that clause were not merely contractual as between the two companies, but were statutory obligations or the benefit of and enforceable by consignors of traffic, and that the appellants could set up the clause as a defence to that part of the claim which exceeded the limit.—The decision of the Court of Appeal ([1894] 1 Q. B. 43) reversed.—By Lord Watson: The power conferred by sect. 29 of the Railway and Canal Traffic Act 1888 (51 & 52 Vict. c. 25) to fix group rates "notwithstanding any provision in any general or special Act," cannot affect the rate chargeable, under express statutory provisions, for the conveyance of traffic to any terminus which is not included in the group. DAVIS & SONS *v.* TAFF VALE RAILWAY COMPANY - - 542

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SCOTCH LAW — *Entail — Trust—Directions to entail Lands on the Heirs of another Entailed Estate—Disentail of that Estate.*] By trust-disposition and settlement a testator directed his trustees to execute a deed of entail of the lands of Newmore to and in favour of his niece, and a series of heirs specified, "whom failing, to my nephew," J. F. G. "of Highfield; and failing the whole persons above specified, then, from respect to my deceased grandfather," G. G. "of Highfield, to the heir in possession of the estate of Highfield under the entail thereof for the time, and to the other heirs-substitute in said entail in the order set down in the said entail successively, declaring that my object and intention is that, failing the above series of heirs named by me, then the said lands and estate hereby conveyed are to be held by the heir of entail of the estate of Highfield, along with the said estate of Highfield." By a codicil to the trust-deed the testator expressed his desire that it should be understood "that the destination, in the series of heirs of entail set forth in the foregoing settlement to" J. F. G., "my nephew, who is now in possession of the estate of Highfield under the entail thereof, has been made by me out of respect to the memory of my late grandfather" G. G. "of Highfield, the entailer of the said estate."—The trustees in 1869, J. F. G. being then in possession of Highfield, by deed of entail disponed Newmore to the series of heirs other than the heirs of the entail of Highfield, in the words of the destination contained in the trust deed, the entail proceeding: "Whom failing, to" J. F. G. "of Highfield, who is the heir now in possession of the estate of Highfield under the entail thereof executed by" G. G. . . .

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"and failing the said" J. F. G., "then to the other heirs-substitute in said entail of Highfield." —J. F. G. died and was succeeded by his son, who disentailed Highfield and conveyed it to trustees for a series of heirs different from those called to the succession by the original entail. The pursuer, who was the only heir of entail of Newmore unless the destination to J. F. G. and the heirs called in substitution to him was effectual, thereupon brought an action for a declarator that he was fee-simple proprietor of Newmore, as being the last heir in existence under the destination, and to have the deed of entail of Newmore executed by the trustees set aside as being ultra vires so far as it purported to carry Newmore to the substitute heirs under the Highfield entail independently altogether of their having when the succession opened to them the character of heirs of entail in possession of Highfield:—*Held*, that the pursuer was not entitled to a decree, for the destination in the deed of entail, so far as it created an unconditional succession to Newmore in the other heirs-substitute of Highfield, was warranted by the terms of the trust-deed and codicil; and that this destination was still operative, although the entail of Highfield was no longer in existence. INGLIS *v.* GILLANDERS - 507

2. —— *Husband and Wife—Divorce—Desertion—Reasonable Cause.*] By the Scots Act, 1573, c. 55, it is enacted in effect that it shall be sufficient cause of divorce if either spouse leave the other without reasonable cause and remain maliciously absent for four years.—In an action by a husband against his wife for divorce on the ground of desertion for the statutory period, it appeared that she had left him because of conduct on his part causing her mental distress sufficient to interfere with her restoration to health, and because of menaces by him sufficient to create in her a well-founded apprehension of physical restraint, and culminating in an act of violence against her person:—*Held*, that she had reasonable cause for leaving her husband's house, and for declining to return to it, and that there was a good defence to the action.—Whether in an action for adherence by a husband, misconduct on his part short of cruelty or other matrimonial offence may be a ground for refusing relief, *quære*. MACKENZIE *v.* MACKENZIE - - - 384

3. —— *Husband and Wife—Marriage Contract—Right of Husband's Creditors.*] By antenuptial contract of marriage the husband bound himself, his heirs, executors, and representatives whomsoever, to pay to the wife an annuity of £1000 "to be applied by her towards the expenses of my household and establishment, and that during all the days of my life." He secured the annuity on heritable property, and declared it to be his wife's separate estate free of the jus mariti:—*Held*, that the application of the annuity was for the husband's own benefit, and that the wife was not entitled to the payment of it as against his creditors. BIRKETT *v.* PURDOM 371

4. —— *Local Government—Street—Burgh—"Regular Line of the Street"—Police and Improvement (Scotland) Act*, 1862 (25 & 26 *Vict.* c. 101), *s.* 162—*Height of Buildings—General Turnpike (Scotland) Act*, 1831 (1 & 2 *Will.* 4, *c.* 43).] By sect. 162 of the Police and Improvement (Scotland) Act, 1862, it is enacted, "When any house or building, any part of which projects beyond the regular line of the street, or beyond the front of the house or building on either side thereof, has been taken down in order to be altered, or is to be rebuilt, the commissioners may require the same to be set backwards to or toward the line of the street, or the line of the adjoining houses or buildings":—*Held*, that the expression "regular line of the street" must be taken to mean the line of the buildings forming the street, and not a line indicating that part of the street which is dedicated to the public as highway.—By sect. 91 of the General Turnpike (Scotland) Act, 1831, it is enacted "That no houses, walls, or other buildings above seven feet high shall be erected without the consent of the trustees . . . within the distance of twenty-five feet from the centre of any turnpike road." The burgh of Galashiels, by sect. 40 of the local Act of 1876, adopted clauses 83 to 92 of the General Turnpike (Scotland) Act, 1831, "so far as the said clauses are applicable to the roads and streets within the extended burgh, and in so far as the same are not inconsistent with this Act and the Police Act":—*Held*, that the corporation of the burgh had power under these Acts to restrain a proprietor of vacant land situate within twenty-five feet of the centre of the street from erecting a building thereon above the height of seven feet. SCHULZE *v.* CORPORATION OF GALASHIELS - - - - - - 666

5. —— *Principal and Surety — Guaranty — Mercantile Law (Scotland) Amendment Act*, 1856, *s.* 6.] An undertaking by the defenders to give, when required, a guaranty for the repayment of money to be lent by the pursuer is a good "cautionary obligation" within the meaning of sect. 6 of the Mercantile Law (Scotland) Amendment Act, 1856, and is as binding on the defenders as a direct obligation. WALLACE *v.* GIBSON - - - - - - 354

6. —— *Ship—Bill of Lading—Pledge—Redelivery of Goods to Pledgor in Trust for Sale—Transaction in England—Validity of Arrestment of Funds in Scotland—Conflict of Laws.*] In the law of Scotland, as in the law of England, a pledgee may redeliver the goods to the pledgor for a limited purpose without thereby losing his rights under the contract of pledge.—The pledgors of a bill of lading representing a specific cargo were under contract to sell a larger quantity of like goods to third parties. The pledgees returned the bill of lading to the pledgors to obtain delivery of the merchandise and sell on the pledgees' behalf, and account for the proceeds towards satisfaction of the debt:—*Held*, that the pledgees' security was not affected, and they were entitled to the proceeds of the cargo as against the diligence of general creditors of the pledgors. —A question between domiciled English parties as to the title to a moveable fund situated in Scotland is generally a question of English law. —*Tod & Son* v. *Merchant Banking Company* (10 Court Sess. Cas. 4th Series (Rettie), 1009) dis-

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tinguished. NORTH WESTERN BANK *v.* POYNTER, SON, & MACDONALDS - - - - 56

7. —— *University—Affiliation—University of St. Andrews and University College of Dundee—"Ordinance"—Approval by Parliament—The Universities (Scotland) Act*, 1889 (52 & 53 *Vict. c.* 55), *ss.* 15, 16, 19, 20.] The Universities (Scotland) Act, 1889, appointed a temporary commission charged with the duty of making provision for improving the administration of the Scottish universities and extending their usefulness. By sect. 15 the Commissioners might, if they thought fit, make ordinances to extend any of the universities by affiliating new colleges to them subject to certain prescribed conditions. By sect. 16, "without prejudice to any of the powers hereinbefore conferred, the Commissioners shall with respect to the University of St. Andrews and the University College of Dundee have power (1) to affiliate the said university college to and make it form part of the said university with the consent of the University Court of St. Andrews and also of the said college with the object, inter alia, of establishing a fully equipped conjoint university school of medicine. . . . ." Sect. 19 contained provisions as to the preparation and publication by the Commissioners of ordinances relating to any university. By sect. 20, all ordinances made by the Commissioners are to be published in the *Edinburgh Gazette*, laid before parliament, and submitted to the Queen in Council for approval, and "no such ordinance shall be effectual until it shall have been so published, laid before parliament, and approved by Her Majesty in Council."—The Commissioners, assuming to act under the powers of sect. 16, executed an instrument in writing by which they declared that they had affiliated and did thereby affiliate the University College of Dundee to and make it form part of the University of St. Andrews. This instrument was not published or laid before parliament or submitted to Her Majesty for approval, as required by sect. 20 in the case of all ordinances made by the Commissioners:—*Held*, that the order of the Commissioners contained all the elements of an "ordinance" properly so termed, and that although sect. 16 gave the power of affiliation to the Commissioners in direct terms without requiring them to make an ordinance for that purpose, yet, having regard to the language of sects. 19 and 20, taken in connection with other clauses, it appeared to be the general policy of the Legislature that all acts of the Commissioners altering the constitution of a university, and necessarily affecting interests public or private or both, should be attended with the precautions and safeguards provided by the statute; that the instrument executed by the Commissioners must, therefore, be taken to be an "ordinance," subject to the procedure enacted by sect. 20 with regard to "ordinances," and that for want of due compliance with this procedure it was invalid. METCALFE *v.* COX - - - - - 328

8. —— *Waterworks—Power to break up Street—Land not dedicated to Public Use—Waterworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 17), *ss.* 28, 29.] By sect. 28 of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), it is provided that the

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undertakers may open and break up the soil and pavement of the several streets and bridges within the limits of the special Act, and may open and break up any sewers, drains, or tunnels within or under such streets and bridges, and lay down and place within the same limits pipes, &c. By sect. 29 it is provided that nothing therein contained shall authorize the undertakers to lay down or place any pipe . . . . or other work in any land not dedicated to public use, without the consent of the owners or occupiers thereof. . . . .—*Held*, that the undertakers were not authorized by sect. 28 to cut through plates lying on the top of a girder railway bridge carrying a public road for the purpose of suspending their pipes to the girders. LORD PROVOST, &C., OF GLASGOW *v.* GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY - - - - - - 376

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